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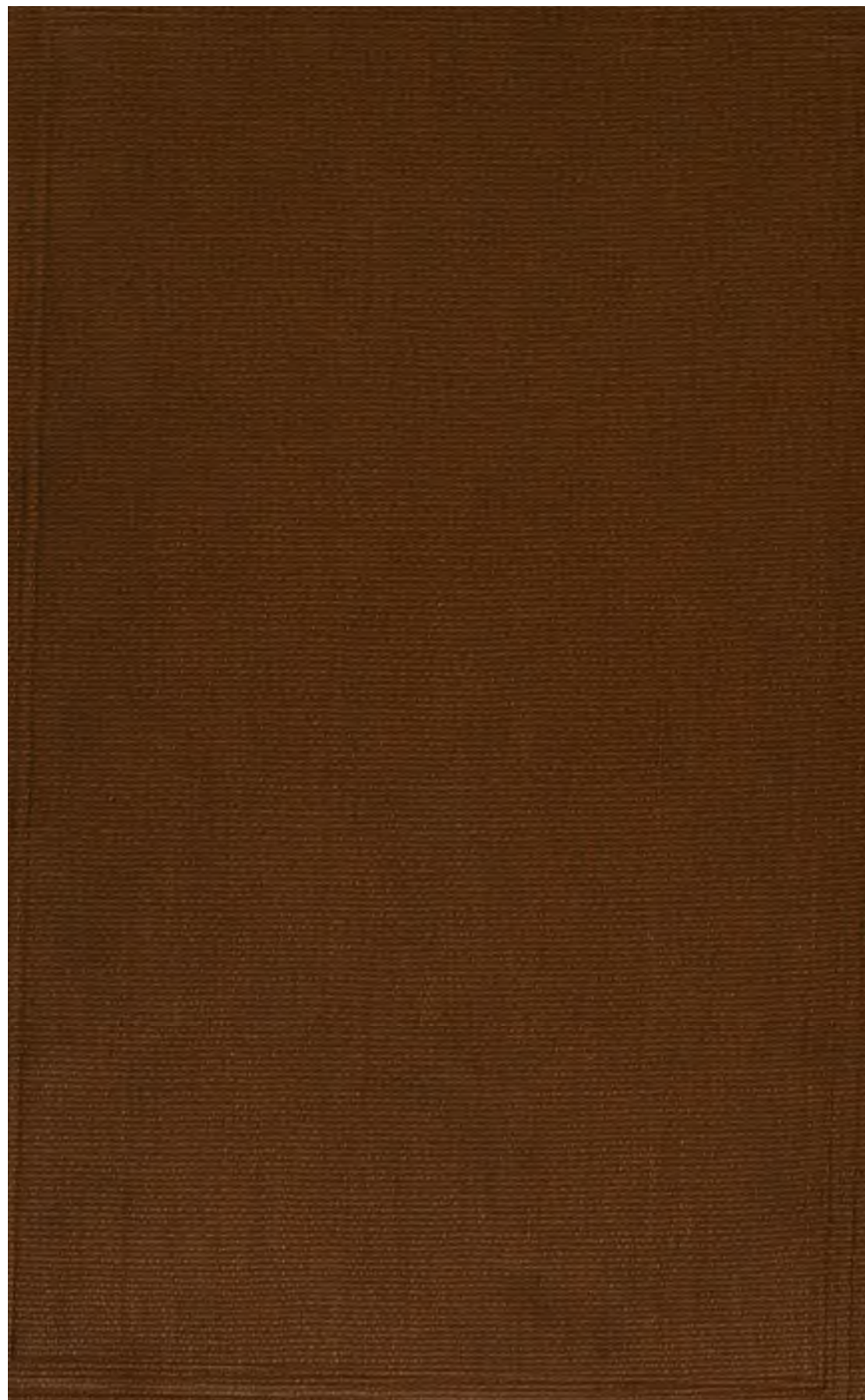
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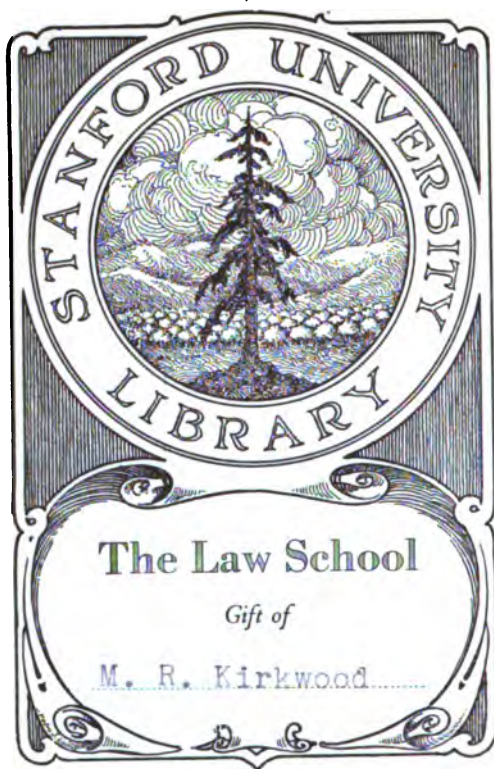
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SELECTED CASES

ON

THE LAW OF

NEGOTIABLE

INSTRUMENTS

BY

ROBERT E. BUNKER

PROFESSOR OF THE LAW OF BILLS AND NOTES
IN THE UNIVERSITY OF MICHIGAN

CHICAGO:
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PREFACE

The cases appearing in this volume have been selected primarily for the use of students pursuing the study of Negotiable Instruments and particularly for students of the Law Department of the University of Michigan. They are arranged in an order to conform to the plan of instruction now pursued in that Department. The plan to which reference is made is sufficiently indicated by the Table of Contents *infra*. In brief, it involves a study of the law of Negotiable Instruments on the basis of the contract of the several parties as that law has been declared by the courts and, incidentally only, a study of the "Negotiable Instruments Law." The cases will be found to illustrate the several phases of the negotiable contract and to be arranged, I believe, in such an order as to show, in sequence, the liabilities and rights of parties to Negotiable Instruments. As to selection and arrangement they are submitted to the test of actual use. It is my hope, if not my expectation, that when the plan exemplified by this volume is put to the test of actual use it will be found of service to all who seek to acquire a comprehensive knowledge of the law of Negotiable Instruments.

I am under obligations to Mr. H. Gerald Chapin of New York City, for valuable suggestions, and to Mr. Oscar E. Waer of the Michigan Bar, and Mr. Ralph M. Tate of the law class of 1907, University of Michigan, for valuable assistance in the preparation of this work, obligations which I acknowledge with grateful appreciation.

ROBERT E. BUNKER.

ANN ARBOR, MICHIGAN,
October 1, 1906.

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CASES

ON

NEGOTIABLE INSTRUMENTS

TITLE I.

HISTORY OF THE LAW MERCHANT.

Dunlop v. Silver, 1 Cranch (App't), (1801), 367.

The case was this: James Cavan made a promissory note, by which he promised to pay to Silver *et al.*, or order, sixty days after date, \$600 for value received, negotiable at the Bank of Alexandria. Silver *et al.* indorsed the note to Downing & Dowell in these words, "pay the contents to Downing & Dowell," who indorsed, "pay the contents to John Dunlop or order." Dunlop had obtained judgment on the note against Cavan, the maker, who was taken upon the execution, and took the oath of an insolvent debtor.

The declaration had two counts. 1st. A special count stating the making and indorsing the note, the suit, judgment, execution and insolvency of Cavan, by reason whereof the defendant became liable, etc. 2d. *Indebitatus assumpsit* for money had and received. The plea was *non assumpsit*, and a verdict was taken for the plaintiff subject to the opinion of the Court, upon the point, whether the holder could maintain an action against the remote indorser of a promissory note. * * * * The principal question then is whether this action could have been supported in England before the Statute of Anne.¹

I. In order to ascertain how the law stood before that statute, it may be necessary to examine how far the custom of merchants,

¹ See text of this statute—Intro. Bunker's Neg. Ins. 18-20.

or the *lex mercatoria*, was recognised by the courts of justice and by what means the common-law forms of judicial proceedings were adapted to its principles.

A distinction seems to have been made, very early, between the contracts of merchants (especially of foreign merchants) and those of other people. Nearly six hundred years ago we find their "old and rightful customs" protected by the great charter of English liberties. (*Magna Charta*, c. 30.) Peculiar privileges were also granted them more than 500 years ago by the Statute of Acton Burnel, *de mercatoribus* 11 Edw. I., and the Statute of Merchants, 13 Edw. I. And in the reign of Edw. III., many statutes were made for their encouragement, in some of which, particularly 27 Edw. III., c. 19 and 20, the law merchant is expressly recognised. In 13 Edw. VI., 9, 10 (cited by Malloy, book 3, c. 7, § 15), it is said, that "a merchant stranger made suit before the king's privy council, for certain bales of silk, feloniously taken from him, wherein it was moved that this matter should be determined at common law; but the lord chancellor answered, that this suit is brought by a merchant who is not bound to sue according to the law of the land nor to tarry the trial of twelve men." The custom of merchants is mentioned in 34 Hen. VIII., cited in *Bfo. Abr.*, tit. Customs, pl. 59, where it was pleaded, as a custom between merchants throughout the whole realm, and the plea was adjudged bad, because a custom throughout the whole realm was the common law. And for a long time, it was thought necessary to plead it as a custom between merchants of particular places, viz., as a custom among merchants residing in London and merchants in Hamburg, &c. By degrees, however, the courts began to consider it as a general custom. *Co. Litt.* 182, 2 Inst. 404. And in the time of James I., Ch. J. Hobart, in the case of *Vanheath v. Turner*, Winch 24, said that "the custom of merchants is part of the common law, of which the judges ought to take notice." It was still, however, deemed necessary to set forth the custom specially; and in that form the precedents continued, for some time after. Indeed, the pleadings continued in that form, long after the courts had decided it to be unnecessary. Lord Coke in his *Commentary on Littleton* (first published in 1628), folio 182a, speaking of the *lex mercatoria* says, "Which, as hath been said, is part of the laws of this realm." See also 2 Inst. 404.

But after this, in the year 1640, in *Eaglechild's case* reported in Hetly 167 and Litt. 363, 6 Car. I (it was said to have been

ruled in B. R.), that upon a bill of exchange between party and party, who were not merchants, there cannot be a declaration upon the law merchant, but there may be a declaration upon *assumpsit*, and give the acceptance of the bill in evidence." This decision seemed to confine the operation of the law merchant, not to contracts of a certain description, but to the persons of merchants: whereas, the custom of merchants is nothing more than a rule of construction of certain contracts. Jac. Law Dict. (Toml. edit.), tit. Custom of Merchants. *Eaglechild's case*, however, was overruled in 18 Car. II B. R. (1666), in the case of *Woodward v. Rowe*, 2 Keb. 105, 132, which was an action by the indorsee against the drawer of a bill of exchange. "The plaintiff counted on the custom and law of the realm that if any man writes a bill to another, then if he to whom the bill is directed do not pay for the value received by the maker, the maker of such bill should pay." "It was moved in arrest of judgment, that this count is ill, the general custom being the law; and it doth not appear to the court that there is any such law. *Sed curia*, contra, that by the common law, a man may resort to him that received the money, if he to whom the bill was directed refuse." It was afterwards moved again, that this "is only a particular custom among merchants, and not common law; but, *per curiam*, the law of merchants is the law of the land; and the custom is good enough, generally, for any man without naming him merchant; judgment *pro* plaintiff, *per totam curiam*, and they will intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant.

The same principle was, two years afterwards, recognised in an *Anonymous* case (but believed to be *Milton's Case*, vide 1, Mod. 286) in the Exchequer, reported in Hadres 485, Mich. 20 Car. II (1668), where the plaintiff declared on the custom of England, and after verdict, Offley moved in arrest of judgment, because the "plaintiff had declared that *per consuetudinem Angliae*, &c., which he said was naught, because the custom of England is the law of England, and what the judges are bound to take notice of; and that, therefore, the *consuetudo Angliae* ought to have been omitted." But the Chief Baron said, "but for the plaintiff's inserting the custom of the realm into his declaration here, I hold that to be mere surplusage and redundancy, which does not vitiate the declaration." And again he says, "it were worth while to inquire, what the course has been amongst merchants; or to direct an issue for trial of the custom among

merchants; yet, all their customs we cannot know, but by information." Afterwards, in declaring their opinions, the court said "that this course of accepting bills being a general custom amongst all traders, both within and without the realm, and having everywhere that effect to make the acceptor subject to pay the contents, the Court must take notice of that custom."

Notwithstanding these decisions, the question was again made, about twenty years afterwards, in the case of *Carter v. Downish* (1 W. & M. Anno 1688), 1 Show. 127, in the Exchequer, on a writ of error from the king's bench. The defendant had covenanted to pay all bills which should be drawn on him, in favor of the plaintiff, on account of 1000 kentals of fish, and the breach assigned was, the non-payment of a certain bill. The defendants pleaded, that the plaintiff by indorsement on the bill, according to the custom of merchants, appointed the payment to Herbert Aylwin, or his order, who indorsed it to Tassel, to whom the defendant paid it. To this plea there was a demurrer and joinder. One of the errors assigned was, that the defendant had not set forth a particular custom, to warrant the indorsement. To which it was answered "that the law and custom of merchants warrant the indorsement of foreign bills of exchange, and for that, all the book cases on foreign bills are a proof; and that such indorsement doth really transfer the property of the money, or contents, in such bills to the indorsee, and that all this law of merchants is part of the law of the land, and the judges are obliged to take notice of that as well as of any other law." * * *

Three years after this, however, the point was again made, in the case of *Mogadara v. Holt* (3 W. & M.), 1 Show. 318 and 12 Mod. 15, 16 (Anno 1699), where it was held by Holt, Chief Justice, and the whole court, "that the law of merchants is *jus gentium*, and a part of common law, and *ergo*, we ought to take notice of it when set forth in pleading." And "though the plaintiff hath alleged a custom contrary to fact, yet that is but surplusage; and he needed not to have alleged a custom." *Jud. pro quer.*

Not satisfied with these adjudications, the question was again agitated two years afterwards, in the exchequer, on a writ of error from the king's bench, in the case of *Williams v. Williams*, Carth. 269 (Pasch. 5 W. & M., Anno 1693) where "the only error insisted on was that the plaintiff had not declared on the custom of merchants in London, or any other particular place (as the usual way is) but had declared on a custom through all England, and if so, 'tis the common law, and then it ought not to

be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place from whence a venue might arise to try it. To which it was answered, that this custom of merchants, concerning bills of exchange, is part of the common law of which the judges will take notice *ex officio*, as it was resolved in the case of *Carter v. Downish*; and therefore, it is needless to set forth the custom specially in the declaration, for it is sufficient to say, that such a person *secundum usum et consuetudinem mercatorum*, drew the bill; therefore, all the matter in the declaration concerning the special custom was merely surplusage and the declaration good without it. The judgment was affirmed."

* * * Again, in Hilary term (B. R. 8 and 9, Wm. III, *Anno* 1697) *Pinkney v. Hall*, 1 *Ld. Raym.* 175, the exception was taken, "that the declaration being *per consuetudinem Angliæ*, &c., was ill, because the custom of England is the law of England, of which the judges ought to take notice, without pleading. *Sed non allocatur*. For the custom is not restrained to any particular place."

The same principles were, in the same term, in the common pleas, held, in the case of *Bromwich v. Loyd* (Hilary term, 8 Wm. III) 2 *Lutw.*, 1585, where Treby, Chief Justice, said, "That bills of exchange, at first were extended only to merchant strangers, and afterwards to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons trading or not; and there was no occasion to allege any custom: and that was not denied by any of the other justices."

In 10 Wm. III, *Anno* 1698 B. R., *Hawkins v. Cardy*, 1 *Ld. Raym.* 360, an action was brought on a promissory note, made by the defendant, and indorsed by the payee to the plaintiff for part only, who declared on the custom of merchants for such an indorsement. But on demurrer it was adjudged ill. "For a man cannot apportion such personal contract, for he cannot make a man liable to two actions, where by contract he is liable but to one." And Holt, Chief Justice, said, "This is not a particular local custom, but the custom of merchants, of which the law takes notice; and therefore the court cannot take the custom to be so. Judgment for defendant."

Four years after this, in the case of *Buller v. Crips*, 6 *Mod.* 29 (B. R. 2 *Ann.*, *Anno* 1702) Lord Holt said, "I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor * * * And in my Lord North's time it was said, that the custom in that case was

part of the common law of England, and the actions since became frequent as the trade of the nation did increase; and all the difference between foreign and inland bills is, that foreign bills must be protested before a public notary, before the drawer may be charged; but inland bills need no protest."

In the year 1760 (1 Geo. III.), in the case of *Edie v. The East India Company*, 2 Burr. 1226, Mr. Justice Foster said, "Much has been said about the custom of merchants; but the custom of merchants or law of merchants, is the law of the kingdom, and is part of the common law." * * * And in the same case, p. 1228, Mr. Justice Wilmot says, "The custom of merchants is part of the law of England; and courts of law must take notice of it as such." * * * In the case of *Pillans & Ross v. Van Mierop & Hopkins*, 3 Burr. 1669, Lord Mansfield says, "The law of merchants and the law of the land is the same." * * *

This chronological list of authorities tends to elucidate the manner in which the custom of merchants gained an establishment in the courts of law, as part of the common or general law of the land; and shows that it ought not to be considered as a system contrary to the common law, but as an essential constituent part of it, and that it always was of co-equal authority so far as subjects existed for it to act upon. The reason why it was not recognized by the courts, and reduced to a regular system, as soon as the laws relating to real estate, and pleas of the crown, seems to be, that in ancient times, the questions of a mercantile nature, in the courts of justice, bore no proportion to those relating to the former subjects. Before the time of James I., we have scarcely a mercantile case in the books; and yet, long before that time, the laws respecting real estates and the criminal code were nearly as well understood as they are at this day. * * *

Another reason, perhaps, why we see so much tardiness in the courts in admitting the principles of commercial law in practice, has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established, until after those forms had acquired a kind of sanctity from their long use. * * * It required the transcendent talents, and the confidence in those talents, which were possessed by Lord Mansfield to remove those obstructions. When he ascended the bench he found justice fettered in the forms of law. It was his task to burst those fetters and to transform the chains into instruments of substantial justice. From that time a new era commenced in the history of English jurisprudence. His sagacity discovered those intermediate terms, those minor propo-

sitions, which seemed wanting to connect the newly-developed principles of commercial law with the ancient doctrines of the common law, and to adapt the accustomed forms to the great and important purposes of substantial justice in mercantile transactions.

II. Forms of pleading often tend to elucidate the law. By observing the forms of declarations, which have, from time to time been adapted, in actions upon bills of exchange, we may perhaps discover the steps by which the courts allowed actions to be brought upon them as substantive causes of action without alleging any consideration for the making or accepting them. The first forms which were used take no notice of the custom of merchants as creating a liability distinct from that which arises at common law; but by making use of several fictions, bring the case within the general principles of actions of *assumpsit*. The oldest form which is recollected is to be found in Rastell's Entries fol. 10 (a), under the head, "Action on the case upon promise to pay money." Rastell finished his book, as appears by his preface, on the 28th of March, 1564, and gathered his forms from four old books of precedents, then existing. This declaration sets forth that A complains of B, &c., for that whereas the said A, by a certain I C, his sufficient attorney, factor and deputy in this behalf, on such a day and year, at L., at the special instance and request of the said B, had delivered to the said B, by the hand of the said I C, to the proper use of the said B, 110*l* 8*s* 4*d*, lawful money of England; for which said 110*l* 8*s* 4*d*, so to the said B delivered, he the said B, then and there, to the said I C (then being the sufficient attorney, factor and deputy of the said A in this behalf) faithfully promised and undertook, that a certain John of G. well and faithfully would content and pay to Reginald S. (on such a day and year, and always afterwards, hitherto the sufficient deputy, factor and attorney of the said A in this behalf) 443 2-3 ducats, on a certain day in the declaration mentioned. And if the aforesaid John of G. should not pay and content the said Reginald S. the said 443 2-3 ducats, at the time above limited, that then the said B would well and faithfully pay and content the said A 110*l* 8*s* 4*d* lawful money of England, with all damages and interest thereof, whenever he should be thereunto by the said A requested. It then avers, that the said 443 2-3 ducats were of the value of 110*l* 8*s* 4*d*, lawful money of England, that John of G. had not paid the ducats to Reginald S. and that if he had paid them "to the said R, I, B. and associates or to either of them, then

the said 443 2-3 ducats would have come to the benefit and profit of the said A." * * *

This declaration seems to have been by the indorsee of a bill of exchange against the drawer. For although nothing is said of a bill of exchange, or of the custom of merchants, yet the facts stated will apply to no other transaction. It appears that ducats were to be given for pounds sterling; this was in fact an exchange. Again the defendant promised to repay the original money advanced, with all damages and interest; this is the precise obligation of the drawer of a bill of exchange according to the law merchant. Besides, the transaction, if literally true, as set forth in the declaration, was, at least, a very uncommon one. A is supposed to make I. C. his attorney for the purpose of paying 110*l* to B, and to receive a promise from B, that John of G. should pay to Reginald S. 443 ducats. And A is also supposed to have made Reginald S. his attorney for the purpose of recovering the ducats. Such a transaction must certainly be very rare, especially, as it was so much easier to have done the same thing in substance, by a simple bill of exchange. * * *

In the declaration of payee v. acceptor, fol. 338a, the foreign merchant who paid the 1400 crowns to the drawer of the bill in France, to be remitted to the plaintiff (the payee), in England, is stated to be the plaintiff's factor; and the drawer of the bill is stated to be the factor of the defendant (the acceptor), so that the plaintiff, by his factor, is supposed to pay to the defendant, through the medium of the defendant's factor, the 1400 crowns, in consideration of which it is averred that the defendant in England promised the plaintiff to pay him 414*l* 3*s* 4*d*, lawful money of England.

This declaration sets forth, that whereas, the plaintiff, on the 10th of June, 37 Eliz., at Rochelle, in France, in parts beyond seas, by the hands of a certain T. S., then the factor of the plaintiff, at the request of a certain R. W., then the factor of the defendant, delivered and paid to the said R. W., then factor of the defendant, to the use of the defendant, as much ready money as amounted to 1400 French crowns, of the money of France, in parts beyond sea, at the rate of 5*s* 11*d*, lawful money of England, for each French crown. And thereupon, the said R. W., at Rochelle aforesaid, then delivered to the said T. S. three bills of exchange, viz., first, second and third. In the first of which bills of exchange, the said R. W. requested the defendant to pay to the plaintiff at L. 414*l* 3*s* 4*d* lawful money of England at the end of thirty days next after sight of that bill of exchange (the second

and third bills to the plaintiff not paid). It then sets forth the tenor of the second and third bills and then avers that the defendant, on the day and year first aforesaid, at the city of E. * * * in consideration thereof, undertook and to the plaintiff then and there and faithfully promised, that he, the defendant, well and faithfully would pay to the plaintiff, to the plaintiff's use, at the City of E. aforesaid * * * by way of exchange according to the usage of merchants, the aforesaid 414^l 3s 4d lawful money of England, at the end of thirty days next after sight of any of the bills of exchange aforesaid; and the plaintiff in fact saith, that afterwards, viz., on the 1st of September, in the year aforesaid at &c., the first of said bills came to the sight of, and was then and there shown to, the defendant, yet the defendant not regarding, &c., but contriving, &c., did not pay the said 414^l 3s 4d, &c., at the end of said thirty days, &c. * * * In this declaration, it will be perceived that the custom of merchants is not alleged as the foundation of the action or the cause of liability of the defendant; nor is it stated that the defendant accepted the bill. But the plaintiff grounds his action upon the defendant's promise to pay the amount mentioned in the bill, in consideration of 1400 crowns paid to his use in France; and in consideration that his factor had drawn and delivered the bills to the plaintiff's factor. This idea of factorage is probably a fiction, introduced for the purpose of adapting the custom of merchants to the common law forms, and to show a sufficient consideration for the *assumpsit*. The question of factorage was not traversable; as the facts of drawing the bill, and the drawee's acceptance, were sufficient evidence of the drawer's being the acceptor's factor *quoad hoc*. This fiction might, perhaps, be considered as part of the custom of merchants; but at any rate, it seems to have been considered necessary, in order to create that degree of privity between the payee and the acceptor which, at that time, was supposed necessary to support the action of *assumpsit*.

Both this and the former are declarations at common law; that is neither of them is aided by the custom of merchants, unless the custom may be considered as supporting the fiction of factorage. They show, also, that if privity of contract was necessary at common law, to support the action of *assumpsit*, the law would presume a privity or at least would presume facts which constituted a privity, between the payee and acceptor or between an indorsee and a drawer of a bill of exchange.

III. It is not ascertained exactly at what time inland bills first came into use in England or at what period they were first

considered as entitled to the privileges of bills of exchange, under the law merchant. But there was a time when the law merchant was considered as "confined to cases where one of the parties was a merchant stranger", 3 Woodeson, 109; and when those bills of exchange only were entitled to its privileges, one of the parties to which was a foreign merchant. * * * And in *Buller v. Crips*, 6 Mod. 29 (2 Ann.) Lord Chief Justice Holt said he remembered "when actions upon inland bills of exchange first began."

Perhaps Lord Holt might have been correct as to the time when actions upon inland bills first began, or rather when the first notice was taken of a difference between inland and foreign bills; but it appears probable that inland bills were in use much before Lord Holt's remembrance. * * *

The time when inland bills and promissory notes began to be in general use in England was probably about the year 1645 or 1646. * * * Indeed we know that to be the fact, from the cases in the books; upon examining which, we shall find, that there was no distinction made between inland bills of exchange and promissory notes; they were both called bills; they were both called notes; sometimes they were called "bills or notes." Neither the word "inland" nor the word "promissory" was at this time in use as applied to distinguish the one species of paper from the other. The term "promissory note" does not seem to have obtained a general use, until after the statute. There was no distinction made either by the bench, by the bar or by merchants, between a promissory note and an inland bill, and this is the cause of that obscurity in the reports of mercantile cases during the reigns of Charles II, James II and King William, of which Lord Mansfield complained so much in the case of *Grant v. Vaughan*, 3 Burr. 1525 and 1 W. Bl. 488; where he says that in all the cases in King William's time "there is great confusion; for without searching the record, one cannot tell whether they arose upon promissory notes or inland bills of exchange. For the reporters do not express themselves with sufficient precision, but use the words 'note' and 'bill' promiscuously." This want of precision is apparent enough to us who now (since the decision of Lord Holt in the case of *Clerk v. Martin*) read the cases decided by him before that time; but at the time of reporting them, there was no want of precision in the reporter, for there was not, in fact, and never had been suggested, a difference in law between a promissory note and an inland bill. They both came into use at the same

time, were of equal benefit to commerce, depended upon the same principles and were supported by the same law.

IV. The case of *Edgar v. Chut*, or *Chat. v. Edgar*, reported in 1 Keb. 592, 636 (Mich. 15 Car. II, Anno 1663), seems to be the first in the books which appears clearly to be upon an inland bill of exchange. Without doubt, many had preceded it, and passed *sub silentio*. The case was this: A butcher had bought cattle of a grazier, but not having money to pay for them, and knowing that the parson of the parish had money in London, he obtained (by promising to pay for it) the parson's order or bill on his correspondent, a merchant in London, in favor of the grazier. The parson having doubts of the credit of the butcher, wrote secretly to his correspondent, not to pay the money to the grazier, until the butcher had paid the parson. In consequence of which the London merchant did not pay the draft, and the grazier brought his suit against the parson, and declared on the custom of merchants. It was moved in arrest of judgment, that neither the drawer nor the payee was a merchant; but it was held to be sufficient, that the drawee was a merchant.

Next came the case of *Woodward v. Row* (Mich., 18 Car. II, Anno 1666) 2 Keb. 105, 132, in which the court said, that "the law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant; and they will intend that he of whom the value is said to be received by the defendant, was the plaintiff's servant."

The next is *Milton's case* (Mich., 20 Car. II) Hardr. 485, of which it may be necessary to take notice, as it has been considered as a leading case, and as having established some principles upon which a number of subsequent cases have been decided. It was an action of debt, in the exchequer, upon a bill of exchange accepted. The plaintiff declared, that by the custom of England, if a merchant send a bill of exchange to another merchant, to pay money to another person, and the bill be accepted, that he who accepts the bill does thereby become chargeable with the sum therein contained; and that a certain merchant drew a bill of exchange upon the defendant, payable to the plaintiff, which bill the defendant accepted; *per quod actio acrevit*. Upon *nil debet* pleaded, the verdict was for the plaintiff. A motion was made in arrest of judgment, and one of the reasons assigned was, that there was "no privity between the plaintiff and defendant," "nor any contract in deed or in law."

The Chief Baron, among other things, said, that "without

doubt, if the common law, or the custom of the place, create a duty, debt lies for it; as in the case of a toll due by custom. * * * But the great question here is, whether or no a debt or duty be hereby raised: for if it be no more than a collateral engagement, order or promise, debt lies not, as in the case that has been cited, of goods delivered by A to B, at the request of C, which C promiseth to pay for, if the other does not; for in that case a debt or duty does not arise betwixt A and C, but a collateral obligation only. In our case, the acceptance of the bill amounts clearly to a promise to pay the money; but it may be a question whether it amounts to a debt or not."

Precedents were ordered to be searched; but none being found, the court, afterwards, in Hilary term, 20 & 21 Car. II., declared their opinions, "that an action of debt would not lie upon a bill of exchange accepted, against the acceptor; but that a special action upon the case must be brought against him. For the acceptance does not create a duty, no more than a promise made by a stranger to pay, &c., if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it. And this course of accepting bills, being a general custom among all traders, both within and without the realm, and having everywhere that effect as to make the acceptor liable to pay the contents, the court must take notice of that custom; but the custom does not extend so far as to create a debt; it only makes the acceptor *onerabilis* to pay the money. Though custom may give an action of debt, as in the case of toll; and so in case of a fine for a copyhold. Wherefore, and because no precedent could be produced that an action of debt had been brought upon an accepted bill of exchange, judgment was arrested."

The ground of this judgment seems to be, that the drawer is the original debtor, and that the undertaking of the acceptor is only to pay the drawer's debt; and therefore, is a collateral and not an original engagement. If the court were mistaken in this position, the case is not law; or, at least, the reason of the case fails. It may be true, that the drawer is the original debtor, until the bill is accepted; but after the bill is accepted, the acceptor is the original debtor, and the undertaking of the drawer is collateral, viz., to pay in case the acceptor does not. * * *

(After commenting upon numerous cases, the court continues): We have now examined all the reported cases upon promissory notes, from the time of the first introduction of inland

bills, to the time of Lord Holt's decision in the case of *Clerke v. Martin*. At least, if any others are to be found, they have escaped a diligent search. They form a series of decisions for a period of more than thirty years, in which we discover an uncommon degree of unanimity as well as of uniformity. We find the law clearly established to be the same upon promissory notes as upon inland bills; and we find no evidence that the latter were in use before the former. There is not a contradictory case, or even *dictum*, unless we consider as such the doubt expressed in the case of *Butcher v. Swift*, cited by Comyns; but that case is not reported, and therefore, it is impossible to say, upon what ground the doubt was suggested. The cases upon promissory notes and inland bills go to establish not only their likeness in every respect, but even their identity; for the former are almost uniformly called inland bills.

V. Upon examining the printed books of precedents, during the above period, we shall find that the common usage was, to declare upon a promissory note, as upon an inland bill of exchange. * * * (After commenting upon various precedents, the court continues): Upon a review of this list of authorities and precedents, we are at a loss to imagine from what motive, and upon what grounds, Lord Holt could at once undertake to overrule all these cases, and totally change the law as to promissory notes; and why he should admit inland bills of exchange to be within the custom of merchants, and deny that privilege to promissory notes; when the same evidence which proved the former to be within the custom, equally proved that it extended to the latter. By examining the books, it will be found, that most of the points which have been decided respecting inland bills of exchange, have been decided upon cases on promissory notes. If he considered promissory notes as a new invention, when compared with inland bills of exchange, he seems to have mistaken the fact; for the probability is, that the former are the most ancient, or, to say the least, are of equal antiquity.

But let us proceed to examine the case of *Clerke v. Martin* (Pasch., 1 Anne, B. R., 2 Ld. Raym. 757; 1 Salk. 129), upon which alone is founded the assertion in modern books "that before the statute of Anne, promissory notes were not assignable or indor-sable over, within the custom of merchants, so as to enable the indorsee to bring an action in his own name against the maker." The case is thus reported by Lord Raymond:

"The plaintiff brought an action upon the case, against the defendant, upon several promises; one count was upon a general

indebitatus assumpsit for money lent to the defendant; another was upon the custom of merchants, as upon a bill of exchange; and showed that the defendant gave a note subscribed by himself, by which he promised to pay——— to the plaintiff, or his order, &c. Upon *non assumpsit*, a verdict was given for the plaintiff, and entire damages. And it was moved in arrest of judgment that this note was not a bill of exchange, within the custom of merchants, and therefore, the plaintiff, having declared upon it as such, was wrong; but that the proper way, in such cases, is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be good evidence of it.

"But it was argued by Sir Bartholomew Shower, the last Michalmas term, for the plaintiff, that this note being payable to the plaintiff or his order, was a bill of exchange, inasmuch as, by its nature, it was negotiable; and that distinguishes it from a note payable to I. S., or bearer, which he admitted was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently, not negotiable, and therefore, it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought his action upon it, as upon a bill of exchange, and might have declared upon the custom of merchants. Why then should it not be, before such indorsement, a bill of exchange to the plaintiff himself, since the defendant, by his subscription, has shown his intent to be liable to the payment of this money to the plaintiff or his order; and since he hath thereby agreed that it shall be assignable over, which is, by consequence, that it shall be a bill of exchange. That there is no difference in reason, between a note which saith, 'I promise to pay to I. S., or order,' &c., and a note which saith, 'I pray to pay to I. S., or order,' &c., they are both equally negotiable, and to make such a note a bill of exchange can be no wrong to the defendant, because he, by the signing of the note, has made himself to that purpose a merchant (2 Vent. 292, *Sarsfield v. Witherly*), and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants."

But Holt, Chief Justice, was *totis viribus* against the action, and said that this could not be a bill of exchange. That the maintaining of these actions upon such notes were innovations upon the rules of the common law; and that it amounted to a new sort of specialty, unknown to the common law, and invented in Lombard Street, which attempted, in these matters of bills of

exchange, to give laws to Westminster Hall. That the continuing to declare upon these notes, upon the custom of merchants, proceeded upon obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarsfield v. Witherly*, he said, he was not satisfied with the judgment of the king's bench, and that he advised the bringing of a writ of error. * * *

As four other cases are reported upon this subject, prior to the statute of Anne, all of which were dependent upon this of *Clerke v. Martin*, it may be proper to notice what fell from the court in each, before any comments are made on that case.

(After discussing the four cases, viz., *Potter v. Pearson*, 1 Ld. Raym. 774; *Williams v. Cutting*, 2 Ld. Raym. 825; *Burton v. Souter*, 2 Ld. Raym. 825, and *Buller v. Crips*, 6 Mod. 29, the court continues.) These five cases, viz., *Clerke v. Martin*, *Potter v. Pearson*, *Burton v. Souter*, *Cutting v. Williams*, and *Buller v. Crips*, are the only reported cases in which the former decisions were overruled, and it may be observed, that the four last were decided upon the authority of the first, which is to be considered as the leading case; and it is in that case, therefore, that we are to look for the grounds upon which so great a change of the established law was founded. We shall, however, consider the reasons that are scattered among the whole, as having concurred in the formation of Lord Holt's opinion. In the first place, we find an assertion of his lordship, in *Clerke v. Martin*, "that this note could not be a bill of exchange," but he seems to have been too much irritated, at that time, to give a reason for the assertion, or to recollect that in the case of *Hill v. Lewis*, upon promissory notes, he had said, "that goldsmiths' bills were governed by the same laws and customs as other bills of exchange," and that the verdict in that case would be good, "if found upon bills of exchange." His next assertion is, "that the maintaining these actions upon such notes, were innovations upon the rules of the common law." But if, as we have shown, the custom of merchants is a part of the common law; if promissory notes had always, from the time of their first introduction, been adjudged to be as much within the custom of merchants as inland bills of exchange, then an action on a promissory note founded on the custom was not more an innovation than a like action upon an inland bill of exchange. Besides that could hardly deserve the name of innovation, which had been sanctioned by all the

judges of England, on a demurrer, as was the case in *Williams v. Williams*.

His next assertion is, "that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street." To this, it may be answered, that it did not amount to the setting up a specialty, because the consideration of a specialty is not examinable at law; but between immediate parties to a bill of exchange, or a promissory note, the defendant might always have availed himself of the want of consideration. It only amounted, at most, to the setting up a promissory note as a bill of exchange. The assertion that promissory notes were invented in Lombard Street is certainly not correct, for Malynes mentions them as in use in foreign countries, and as being assignable by the custom of merchants, long before they appear to have been introduced into England. The other assertions of his lordship only tend to show a degree of irritation which derogates from the respect which the decision might otherwise deserve. * * *

Hence then, we find, from an examination of all the cases before the statute of Anne, that it never was adjudged, that a promissory note for money, payable to order, and indorsed, was not an inland bill of exchange. But we find, that the contrary principle had been recognised, in all the cases, from the time of the first introduction of inland bills and promissory notes, to the first year of Queen Anne, and that in one of them it had been expressly adjudged, upon demurrer in the king's bench, and the judgment affirmed upon argument, in the exchequer chamber, before all the judges of the common pleas and barons of the exchequer, so that it may truly be said to have been solemnly adjudged by all the judges of England. Principles of law so established are not to be shaken by the breath of a single judge, however great may be his learning, his talents or his virtues. That Lord Holt possessed these in an eminent degree will never be denied; but he was not exempt from human infirmity. * * *

Lord Hardwicke, in the case of *Walmsley v. Child* (*Anno* 1749), 1 Ves. 346, says, "The reason of making the statute 3 and 4 Anne arose from some determinations, in the beginning of her reign, by Holt, Chief Justice, that no action could be maintained on a promissory note, nor declaration thereupon, viz., *Clerke v. Martin*, and *Potter v. Pearson*, 1 Salk. 129, which cases produced the act, as the act itself recites; but that act of parliament did not alter, but that still an *indebitatus assumpsit* may be brought, and the note given in evidence, or proved if

lost." From this concurrent testimony it is apparent, that the case of *Clerke v. Martin* was a hasty, intemperate decision of Lord Holt, which was acquiesced in by the other judges, in consequence of his overbearing authority, "which made others yield to him"; and that he so "pertinaciously" adhered to his opinion, as to render it necessary to apply to parliament to overrule him.

This, it is believed, is the true origin of the statute of Anne, which did not enact a new law, but simply confirmed the old; the authority of which had been shaken by the late decision of Lord Holt. * * *

It follows, therefore, that it was passed simply to restore the old order of things, which had been disturbed by Lord Holt.

The only real effect of the statute was to alter a few words in the declaration. The old forms allege that the defendant became liable by reason of the custom of merchants, the new say that he became liable by force of the statute. Even Lord Holt himself always admitted, that an *indebitatus assumpsit* for money had and received, or money lent, would lie, and the note would be good evidence of it. His objections were only to the form of the action, and not to the liability of the parties.

A promissory note was always as much a mercantile instrument as an inland bill of exchange, and there certainly seems to be more evidence that the former is within the custom of merchants than the latter, and that it was so at an earlier period, on the continent of Europe, from whence it was introduced into England; and when introduced, it came attended with all the obligations annexed, which the custom had attached to it.

We, sometimes, in modern books, meet with an assertion that a promissory note was not negotiable at common law; this may be true, because a promissory note was not known at common law, if from the term common law we exclude the idea of the custom of merchants. It was a mercantile instrument, introduced under the custom of merchants. But if the custom of merchants is considered, as it really is, a part of the common law, then the assertion that a promissory note was not negotiable at the common law, is not correct.

Goodwin v. Roberts, L. R. 10 Exchequer (1875), 337.

The facts are sufficiently stated in the opinion

Benjamin (Q. C.), for the plaintiff.

Brown (Q. C.), for the defendant.

July 7. The judgment of the Court (Cockburn, C.J., Mellor, Lush, Brett, and Lindley, JJ.) was delivered by

COCKBURN, C.J. The question for our decision in this case is whether certain scrip issued by the authority of the Russian Government, and certain other scrip issued by the authority of the Austro-Hungarian Government, is a negotiable security for money, so that the transfer of it by a person not being the true owner to a bona fide holder, for value, can confer a good title on the latter.

The scrip in question was bought by the plaintiff through one Clayton, a stockbroker, and was allowed to remain in Clayton's hands, who unlawfully pledged it with the defendants, who are bankers, as security for a loan of money. Clayton having become bankrupt and having absconded, the defendants sold the scrip at the market price of the day, and the plaintiff brings his action to recover the amount realised on such sale.

The scrip in question was in the following form:—

"1873 . C. 1873. Imperial Government of Russia. Issue of 15,000,000*l.* sterling nominal capital in 5 per cent. consolidated bonds of 1873. Negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. de Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st of December, 1873. Scrip for one hundred pounds stock, No. —.

"Received the sum of twenty pounds, being the first instalment of 20 per cent. upon one hundred pounds stock, and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial Government.

"London, 1st December, 1873. The instalments are to be paid at our office as follows: 15*l.* per cent., or 15*l.*, on the 5th February, 1874; 15*l.* per cent., or 15*l.*, on the 9th of March, 1874; 20*l.* per cent., or 20*l.*, on the 2nd May, 1874; 23*l.* per cent. or 23*l.*, on the 9th June, 1874. Subscribers may pay the same, under a discount at 3 per cent. per annum, on any Monday or Thursday after the 16th instant.

"In default of payment of these instalments at the proper dates, all previous payments will be liable to forfeiture." Then follow four other receipts for 20*l.* each, making up the 100*l.*, for which the bond is afterwards to be given.

The scrip issued by the authority of the Austro-Hungarian Government was in a precisely similar form.

The scrip in question was issued by Messrs. de Rothschild as the agents of the Russian and Austro-Hungarian governments, they being employed by these governments to negotiate and raise a loan for them respectively on government bonds, bearing interest, to be afterwards issued in exchange for the scrip when all the instalments of the sum for which the scrip was issued should have been paid up. No question is raised as to the fact of Messrs. de Rothschild having acted in the matter as agents of the two governments, or of the scrip having been issued by the authority of the latter.

The contention on the part of the plaintiff was that, scrip of this description not coming under the category of any of the securities for money which, by the law merchant, are capable of being transferred by indorsement or delivery—indeed, not being a security for money at all, but only for the future delivery of a bond—the right of the true owner could not be divested by the fraudulent transfer of the chattel by a person who had no title as against the owner.

Strenuous efforts were made by Mr. Benjamin in his able argument on behalf of the plaintiff to distinguish the present case from *Gorgier v. Mievill*, 3 B. & C. 45. He insisted, first, that although it must be admitted that, if a bond had been given in lieu of this scrip, the bond would have been a negotiable instrument, as the case would then have come within *Gorgier v. Mievill*, 3 B. & C. 45, here there was no engagement on the part of the foreign government. The only party signing the scrip, or who could be held bound by it, were the Messrs. de Rothschild; and the persons advancing their money, and taking the scrip, could look only to them. Secondly, that even assuming that the issuing of the scrip was to be taken to be the act of the foreign government, yet that as it had been issued in London, and the parties taking it had advanced their money in this country, the contract must be taken to have been made here, and must be subject to the law of England. That when a foreign sovereign negotiated a loan in this country, through his agent, it was in effect the same thing as though such sovereign had himself come to this country and entered into the contract in person. That, consequently, in either

view, the contract arising on the scrip must be taken to have been made here, and must be dealt with according to English law. That this being so, the case of *Crouch v. The Crédit Foncier of England*, Law Rep. 8 Q. B. 374, was an authority which established that it was not competent to anyone, by the law of England, to give to a security, not negotiable by the law merchant, the character of negotiability, by making it payable to bearer, even though such security were a security for money. That, a fortiori, this scrip, not being a promise to pay money, but only to give a bond when all the instalments should have been paid up, could not have the character of negotiability given to it by being made payable to bearer. That choses in action not being assignable by the general common law, it was only by the law merchant, which was recognized by the common law and adopted by it, that a particular class of securities for money could be made negotiable, either by indorsement, or by being made payable to bearer; and that this class of securities was confined to bills of exchange, promissory notes, and drafts payable to bearer. That this scrip did not coincide with either of the securities for money to which by the law merchant, the quality of being so rendered negotiable had been conceded; the more so as in fact it was not a security for money at all, but only an agreement to give such a security in the shape of a bond. That the bonds of foreign governments had been held to be negotiable by the Courts of this country, not because they were negotiable by the law of the country in which they were made, but because they were in substance and effect promissory notes.

We entirely dissent from the contention that the contract in question is one in which the Messrs. de Rothschild can be looked upon as principals. And though our decision on that head may not be essential to the conclusion we have arrived at on the case, we think it desirable in a matter in which the public are so much interested that our view should be made known. It is plain on the face of the document that the Messrs. de Rothschild only profess to be acting as the agents of the foreign governments. The law on this subject is correctly laid down in Story on Agency, in the chapter on the Liabilities of Public Agents, s. 302. Collecting the English and American authorities in a note, the learned jurist writes as follows: "In the ordinary course of things, an agent, contracting on behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is, that it is not to be pre-

sumed, either that the public agent means to bind himself personally in acting as a functionary of the government, or, that the party dealing with him in his public character, means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made upon the credit and responsibility of the Government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man, and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconvenience would result from a different doctrine, considering the various public functionaries which the government must employ in order to transact its ordinary business and operations; and many persons would be deterred from accepting of many offices of trust under the government, if they were held personally liable upon all their official contracts. This principle not only applies to simple contracts, both parol and written, but also to instruments under seal, which are executed by agents of the government in their own name, and purport to be made by them on behalf of the government; for the like presumption prevails in such cases, that the parties contract not personally, but merely officially, within the sphere of their appropriate duties."

Chancellor Kent lays down the law to the like effect (2nd Commentaries, p. 810, 7th ed.), "There is a distinction in the books between public and private agents on the point of personal responsibility. If an agent, on behalf of government, makes a contract and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government, and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the general inference to be drawn from all the cases, and it is expressly declared in some of them."

It is true these authors are speaking of persons acting as agents for their own governments; but the reasoning applies equally to persons acting as agents for a foreign government, and the same presumption must arise in both cases. Nor can we sup-

pose that the persons taking this scrip did so otherwise than through their faith in the honour of the foreign government, just as they would have had to trust to it on their afterwards receiving the bonds in lieu of the scrip. They would then be equally without legal redress against the foreign government and must have trusted to its honour in the fulfilment of its engagements.

We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract, as we agree in thinking that its negotiable character, if it exists at all, must depend on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here. "The question," says Tindal, C.J., in *Lang v. Smyth*, 7 Bing. 284, at p. 293, "is not so much what is the usage in the country whence the instrument comes, as in the country where it passed. The substance of Mr. Benjamin's argument is, that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach.

Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage

prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form a part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, in *Brandao v. Barnett*, 12 Cl. & F., at p. 805, "it becomes a part of the law merchant, which Courts of justice are bound to know and recognise."

Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the *Lex Mercatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. 2, c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shews that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure*, Cro. Jac. 6, in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some

instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Savary, cited by Mons. Nougier, in his work "*Des lettres de change*," had assigned to it a later date, namely 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our Courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on Bills, 8th ed., p. 13.

In the meantime, promissory notes had also come into use, differing herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of *Sheldon v. Hentley*, 2 Show. 160, an action was brought on a note under seal by which the defendant promised to pay *to bearer* 100*l.*, and it was objected that the note was void because not made payable to a specific person. But it was said by the Court, "*Traditio facit chartam loqui*, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to *the bearer* of the note, anyone that brings the note shall be paid." Jones, J., said that "it was the custom of merchants that made that good." In *Bromwich v. Lloyd*, 2 Lutw. 1582, the plaintiff declared upon the custom of merchants in London, on a note for money payable on demand, and recovered; and Treby, C.J., said that "bills of exchange were originally between foreigners and merchants trading with the English; afterwards, when such bills came to be more frequent, then they were allowed between merchants trading

in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and, therefore, the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial." To which Powell, J., added, "On indebitatus assumpsit for money received to the use of the plaintiff the bill may be left to the jury to determine whether it was given for value received."

In *Williams v. Williams*, Carth. 269, where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error, that the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the Court would take notice of it ex officio; and, therefore, it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person secundum usum et consuetudinem mercatorum, drew the bill." And the plaintiff had judgment.

Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange had received the sanction of the Courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

It is obvious from the preamble of the statute, which merely recites that "*it had been held* that such notes were not within the custom of Merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The Stat-

ute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country, as cash, Lord Mansfield and the Court of King's Bench had no difficulty in holding, in *Miller v. Race*, 1 Burr. 452, that the property in such a note passes, like that in cash, by delivery, and that a party taking it bonâ fide, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner it was held, in *Collins v. Martin*, 1 B. & P. 648, that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

Both these decisions of course proceeded on the ground that the property in the bank-note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made bonâ fide.

A similar question arose in *Wookey v. Pole*, 4 B. & Ald. 1, in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favour of blank or order, contained this clause, "If the blank is not filled up the bill will be paid to bearer." Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiffs' agent, had been deposited by him with the defendants, on a bonâ fide advance of money. It was held by three judges of the Queen's Bench, Bayley, J., dissentiente, that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. "The Courts," he says, "have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities shew, that not only money itself may pass, and the right to it may arise, by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the

property (i. e., money), to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it."

Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the Courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer (see *Pott v. Clegg*, 16 M. & W. 321). Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another.

Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of *Lickbarrow v. Mason*, 2 T. R. 63, that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our Courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usage, adopted by the Courts, having been thus the origin

of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such.

The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security, to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. It is one which may be in a great degree prevented by prudence and care. It is one which is counterbalanced by the general convenience arising from facility of transfer, or the usage would never have become general to make scrip available to bearer, and to treat it as transferable by delivery. It is obvious that no injustice is done to one who has been fraudulently dispossessed of scrip through his own misplaced confidence, in holding that the property in it has passed to a *bonâ fide* holder for value, seeing that he himself must have known that it purported on the face of it to be available to bearer, and must be presumed to have been

aware of the usage prevalent with respect to it in the market in which he purchased it.

Lastly, it is to be observed that the tendency of the Courts, except only in the time of Lord Holt, has been to give effect to mercantile usage in respect to securities for money, and that where legal difficulties have arisen, the legislature has been prompt to give the necessary remedy, as in the case of promissory notes and of the East India bonds.

The authorities relied on on the part of the plaintiff do not appear to us materially to conflict with this view. In *Glyn v. Baker*, 13 East. 509, which was an action to recover India Bonds, and in which it was held that such bonds did not pass by delivery, the bonds were not made payable to bearer, and there was a total absence of proof that they passed by delivery, though it was asserted by counsel in argument that when these bonds, which in the first instance were made payable to the treasurer of the company, had been indorsed by him, they were afterwards negotiable and passed by delivery from one to another. The inconvenience which would have arisen from this decision was remedied by the immediate passing of 51 Geo. 3, c. 64, by which bonds of the East India Company were made transferable by delivery.

The case of *Partridge v. Governor and Company of the Bank of England*, 9 Q. B. 396; 15 L. J. Q. B. 395, and which, amongst other things, turned on the negotiability of dividend warrants of the Bank of England, is not, so far as that expression is concerned, altogether satisfactory, as the decision turned also upon other points. The bank were in the habit of paying dividends to those entitled to them by warrants, and it was pleaded and proved that by a usage of sixty years standing of the bankers and merchants of London, these warrants, which are not made to bearer, were nevertheless negotiable so soon as the party to whom they were made payable had annexed to them the receipt which the bank required before payment would be made. Such a warrant had been obtained by an agent of the plaintiff authorized to receive his dividends, and had been made over to the defendants for good consideration, in fraud of the plaintiff, so far as the agent was concerned, but without knowledge of such fraud on the part of the defendants. The warrant had been delivered by the defendants to the bank, with whom they had an account, to be carried to their credit, and the amount had been entered to their credit in the cash book of the defendants, but had not been carried to their drawing account. The Court of Queen's Bench held this proof of the custom to be a good defence. The Court of

Exchequer Chamber reversed their judgment, on the ground, among others, that the custom relied on was "rather a *practice of trade* than a *custom* properly so-called, and that such a practice could not alter the law according to which such an instrument conferred no right of action on an assignee." We quite feel the force of this distinction, though it is not quite so clear in what sense it was here intended to be applied. Possibly what was meant was, that the custom applied to the warrants of a particular company, and therefore could not form the subject of any general mercantile usage.

In *Dixon v. Bovill*, 3 Macq. 1, where the note was "to deliver so much iron when required to the party lodging this document with me," there was neither a promise to bearer, nor was there any proof whatever of any usage whereby such notes were dealt with as negotiable. The case has therefore, with reference to its facts, no bearing on the present.

In *Crouch v. The Crédit Foncier of England*, Law Rep. 8 Q. B. 374, the defendants, a limited company, had issued bonds payable to bearer, "subject to the conditions indorsed on this debenture;" and by the conditions so indorsed the bonds were to be paid off by a certain number being drawn at stated periods; in which respect, it may be observed, they bore a close resemblance to the bonds of foreign governments when loans are thus raised by way of bond. A bond thus made having been stolen from the lawful owner, and having been purchased *bonâ fide* by the plaintiff from the thief, was drawn for payment. The plaintiff claimed payment, which was refused, whereupon the action was brought. It was there held by three judges of the Court of Queen's Bench that the plaintiff could not recover; first, because, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. No evidence had been offered at the trial as to whether these or similar documents were in practice treated as negotiable, nor was any expressed admission made as to the point; but it was assumed, from the report of the learned judge before whom the cause was tried, that this had been tacitly admitted. But it was said that these instruments having been only of recent introduction, it followed that such custom, to whatever extent it had gone, must also have been quite recent. Under these circumstances the Court held that, while it was incompetent to the defendants, as an individual company, to give to that which was not a negotiable instrument at law the character of negotiability by making it payable to

bearer, the custom could not have that effect, because, being recent, it formed no part of the ancient law merchant. For the reasons we have already given we cannot concur in thinking the latter ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shewn to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to *Gorgier v. Micville*, 3 B. & C. 45, are to be treated as negotiable. We think the judgment in *Crouch v. The Crédit Foncier*, Law Rep. 8 Q. B. 374, may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called "the ancient law merchant."

In addition to the cases we have already referred to, in which usage has been relied on as making mercantile instruments negotiable, the case of *Lang v. Smyth*, 7 Bing. 284, was cited as shewing that the question with reference to instruments of this description turns upon how far the particular instrument has by usage acquired the quality of negotiability. The action had reference to Neapolitan bonds with coupons attached to them, which latter referred to a certificate. The plaintiff's agent being in possession of the coupons belonging to the plaintiff, but not of the certificate, fraudulently pledged the coupons with the defendant, who took them *bonâ fide*. On an action by the plaintiff to recover the amount received by the defendant on the coupons, Tindal, C.J., left it to the jury to say whether the coupons without the certificate "passed from hand to hand like money or bank notes," in other words, "whether they had acquired, from the course of dealing pursued in the City, the character of bank notes, bills of exchange, dividend warrants, exchequer bills, or other instruments which formed part of the currency of this country." The jury, indeed, found in the negative, but it was held by the Court of Common Pleas that the question had been rightly left to them. If the usage had been found the other way, and the Court had been satisfied with the verdict, it would no doubt have been upheld.

We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if

contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the Courts, have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself. Thus, it having been decided in the two cases of *More v. Manning*, 1 Comyns' Rep. 311, and *Acheson v. Fountain*, 1 Str. 557, that when a bill of exchange was indorsed to A. B., without the words "or order," the bill was nevertheless assignable by A. B., by further indorsement, Lord Mansfield and the Court of King's Bench, in the case of *Edie v. The East India Company*, 2 Burr. 1216, held that evidence of a contrary usage was inadmissible. In like manner in *Grant v. Vaughan*, 3 Burr. 1516, where a cash note, payable to bearer, had been lost by the owner, but had been taken by the plaintiff bonâ fide for value, on an action on the note by the latter against the maker, Lord Mansfield having left it to the jury to say "whether such drafts as this, when actually paid away in the course of trade dealing and business, were negotiable or in fact and practice negotiable," and the jury, influenced no doubt by the natural desire to protect the owner of the note, having found for the defendant, Lord Mansfield and the Court here again set the verdict aside, on the ground that, the law having been settled by former decisions that notes payable to bearer passed by delivery to a bonâ fide holder, the judge ought to have directed a verdict for the plaintiff.

If we could see our way to the conclusion that, in holding the scrip in question to pass by delivery, and to be available to bearer, we were giving effect to a usage incompatible either with the common law or with the law merchant as incorporated into and embodied in it, our decision would be a very different one from that which we are about to pronounce. But so far from this being the case, we are, on the contrary, in our opinion, only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer, as assignable by delivery. This being the conclusion at which we have arrived, the judgment of the Court of Exchequer will be affirmed.

Judgment affirmed.

TITLE II.

THE NEGOTIABLE INSTRUMENT, A CONTRACT.

SECTION I—IN GENERAL.

*Conine v. The Junction and Breakwater R. R. Co. (1866), 3
Houst. (Del.), 288, 89 Am. Dec. 230.*

Action on the following instrument:

GENTLEMEN,—Eighteen months after date please pay to my own order, six thousand nine hundred dollars, for value received, that being the amount which will be due from said State of Delaware to the Junction and Breakwater Railroad Company, January 1st, 1862, out of the semi-annual instalments, which will on that day, be due to said State from Richard France under the provisions of the act of the General Assembly of said State, entitled "An Act for the encouragement of Internal Improvements in the State of Delaware," passed at Dover, January 26th, 1859, and your receipt indorsed hereon for the share of said corporation of said instalment, shall be good against said Corporation.

H. W. McCOLLEY,

Treasurer of the Junction & Breakwater R. R. Co.
To MESSRS. FRANCE, BROADBENT & Co.,
Baltimore, Md.

This instrument was indorsed by said company by the name of H. W. McColley, Treasurer, and accepted upon the face thereof thus: "Accepted, France, Broadbent & Co." The firm of France, Broadbent & Co. was composed of Richard France, Stephen Broadbent, Sr., Stephen Broadbent, Jr., and William C. France. After acceptance the instrument was negotiated with Stephen Broadbent, Sr., who afterwards indorsed and negotiated the same with the said plaintiff. Afterward the said draft was duly presented for payment in Baltimore and payment demanded and refused, of which presentment, demand and refusal the defendant had due notice. Further facts appear in the opinion.

Gilpin, Chief Justice, delivered the opinion of the Court. Considering the third ground of defence taken by the defendant as

fatal to the plaintiff's right to recover in this action, I do not propose to express any opinion on the question as to whether the draft, which is the subject of controversy, was or not, according to its terms and meaning, made payable out of a particular fund, nor the other question as to the legal effect of the draft's having been held by Stephen Broadbent, one of the acceptors as an indorsee. Much has been said and well said on this point, but for the reason just suggested, I do not deem it at all material to pass upon them.

By agreement of the parties the original draft is made a part of the case stated, and upon examination of the draft we find that the corporate seal of the company is affixed or impressed upon the paper upon the left of the signature of H. W. McColley, Treasurer of the Company. The usual terms indicating the affixing of the seal, are not found at the end of the draft—they are omitted altogether. If the case had been tried at the bar of the Superior Court before a jury, the fact of, whether the seal had been rightfully affixed to the draft, might have been controverted, notwithstanding the well established legal presumption arising from the presence of the corporate seal affixed to the instrument produced, that it was placed there by competent authority; the rule being, that, when the common seal of a corporation appears to be affixed to an instrument and the signature of a proper officer is proved or admitted, the Court is bound to presume that the officer did not exceed his authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority; and the burden of showing that it is wrongfully there rests upon the party objecting to it. *Lovitt v. The Steam Saw Mill Association*, 6 Paige 54. *The President, Manager and Company of the Berks and Dauphin Turnpike Road v. Myers*, 6 Serg. & Rawle 12. *Baptist Church v. Mulford*, 3 Halst. (N. J.) 183. The case of *St. Mary's Church*, 7 Serg. & Rawle 530. *The proprietors of the Mill Dam Foundry v. Hovey*, 21 Pick. 417. *Phillips v. Coffee*, 17 Illinois 154. *Johnson v. Crawley*, 25 Ohio 316. *Potter et al. v. Androscoggins & Kennebec R. R. Company*, 37 Maine 316.

But in this case, the question as to whether the seal is rightfully or wrongfully on the draft cannot be raised. For the parties have made the seal itself, just as much as the body of the draft or the signature of the Treasurer, a part of the case stated, without suggesting the slightest doubt of it being there properly. Indeed, it is alleged in the case stated that the draft, after it was indorsed by H. W. McColley, Treasurer of the Junction and Breakwater Railroad Company, was sent by a duly appointed

committee of said company to Baltimore for acceptance, and was there accepted by France, Broadbent & Co. It passed from the hands of the Treasurer to the committee, (of course with the seal on it—for it does not appear that it ever afterwards returned to the hands of the Treasurer)—was sent by them to Baltimore, was accepted by the drawees, was negotiated by the company, and is now produced by the plaintiff with the seal on it and made a part of the case stated. All this amounts to an admission that the seal was placed on the draft rightfully and not surreptitiously, improperly or fraudulently. But aside from this admission, the presence of the seal on the draft, in the absence of evidence or statement impeaching its correctness, concludes the question here, as to its having been affixed by proper authority.

The more approved mode of executing a deed by a corporation, is to conclude the instrument by saying "In testimony whereof the common seal of the said corporation is hereunto affixed." But this is not necessary to the validity of the instrument. Nor is it necessary to name or refer to the seal at all. *Mill Dam Foundry v. Hovey* 21. Pick. 417. *Godard's Case* 5 Co. R. 5. *Com. Dig. Fait a 2. 2 Serg. & Rawle* R. 504. In the case of *Mill Dam Foundry v. Hovey*, the instrument concluded in the words, "In witness whereof we have hereunto set our hands;" and the seal consisted of a wafer and a small bit of paper stamped with a common desk seal of a merchant. And it was contended that this was not the seal of the corporation, the words of *in testimonium* being, "we have hereunto set our hands" merely. But the Court thought otherwise, and decided that it was the deed of the parties, declaring that it had been settled that words indicating that the parties had affixed their seals, were not absolutely necessary.

The question reserved for the decision of this Court is this: whether the instrument of writing sued on and described as a bill of Exchange, does in fact and in law constitute a valid bill of exchange, so as to entitle the present indorsee and holder, William C. Conine, the plaintiff, to sue and recover upon it as such. In other words, is it transferable by mere indorsement, so as to entitle the holder by force of such indorsement, to maintain an action upon it, in his own name.

At the common law, choses in action could not be assigned, so as to give the assignee a right of action in his own name. Bills of Exchange, however, have always constituted an exception to this rule.

The origin of the latter is involved in some obscurity. It

is very questionable whether they were known to the nations of antiquity. But whether they were invented by the Jews and Lombards, (as some writers have supposed) during the thirteenth century, and after their banishment, in order the more readily to draw their effects out of France and England; or by the Gibelins, upon their expulsion from Italy by the Guelphs, in order to avoid confiscation of their effects by their enemies, certain it is that we find them to have been in use among the maritime and commercial communities, inhabiting the shores of the Mediterranean as early as the fourteenth century; from which region, it is most probable, they were introduced into England about the year 1381.

The facilities which they afforded for the safe transmission of money, or values, from one country to another, soon brought them into general use among merchants; and the use of them becoming an established custom, it is believed they received judicial recognition at a very early day, although no authentic decision in regard to the custom, can be found prior to the time of James the First, 1603. The first case of which we have any knowledge, is that of *Marten v. Boure* reported Cro. Jac. 6—7. The declaration in the case, which is set out in the report, describes the cause of action as a bill of Exchange, "signed with his HAND *secundum usum mercatorum*." And from that day to this, no case can be found in the books, of a bill of exchange with a seal affixed to it.

The most solemn and authentic act, as matter of contract, for finally and conclusively binding men to the observance of good faith toward each other, known to the civil law, was called a stipulation; it was entered into before the civil magistrate upon questions and answers, carefully propounded and taken in writing, intended to explain the nature and character of the transaction, and to show that there was no surprise, and that the contract of the parties was their maturely considered and deliberate act. It could only be impeached by fraud.

Deeds, by the common law, are strikingly analogous to the ancient stipulation of the Civilians. The ancient forms and ceremonies prescribed by the common law, for proper authentication and establishment of a deed, were writing, sealing and delivery, and if the parties were illiterate, also reading of the instrument, all indicating a solemn and deliberate act, intended to be final and conclusive between the parties. Sealing was an essential element though signing was not.

Authentic history informs us, that seals come down to us from the most remote antiquity, and were originally derived from

the nations of the far East. The scriptures declare that the "writing that is written in the King's name, and sealed with the King's seal, can no man reverse." Writings under seal constituted part of the formalities of a Jewish purchase of land. "And I bought the field of Hanameel, and weighed him the money, and subscribed the evidence and sealed it, and took witnesses." *see* Jeremiah, chap. 32, 1 Kings, chap. 21, Esther, chap. 8. Daniel, chap. 8, 9.

Seals, however, did not come into general use in England until after, or about the time of, the conquest; indeed, prior to that time, they were almost entirely unknown to our English ancestors; and, probably, the most ancient authentic sealed document in England, is the charter granted by Edward the Confessor to Westminster Abbey. A. D. 1017.

Deeds or sealed instruments, are not only of much higher antiquity than bills of exchange, but they are of a totally different origin. They cannot be said to be made *secundum usum mercatorum*, since they find their recognition and validity in the more ancient rules of the common law. On the other hand, bills of exchange find their origin and sanction in the usage and custom of merchants, the *lex mercatoria*, a particular or peculiar system, which, being in the interest of commerce, became at length gradually ingrafted into, and established as a part of the common law itself. By the common law, contracts are distinguished into two kinds,—contracts under seal, which are specialties, and contracts not under seal, which are simple contracts. It can hardly be necessary to say, that a bill of exchange is not a specialty, for no contract, by that law, is held to be a specialty unless it be under seal, or a matter of record. But notwithstanding a bill of exchange is only a simple contract, it nevertheless differs from other simple contracts in two very important particulars, namely, its negotiability, and its presumed valuable consideration. At common law no chose in action was assignable, until bills of exchange became by force of the custom of merchants, the exception to the general rule. Notes were made assignable in 1704 by the statute 3 and 4 Anne. Bonds and specialties, as well as notes, are made assignable by our statute;—the last by simple indorsement, the two former "under hand and seal and before at least two credible witnesses." *Chap. 63, sec. 8. Revised statutes.* If a specialty had been assignable by mere indorsement, where would have been the necessity for this statutory provision? The distinction between a bill of exchange and a specialty, is found noticed in almost all elementary works on contracts—*Chitty on Contracts* 3. 4. *Chitty on Bills* 12. 13. *Story on Bills, sec. 16.*

2 *Blac. Com.* 465. 466. All contracts under seal are specialties, sealing and delivery being the particular form and ceremony which alter the nature and operation of the agreement. Forms, consecrated by time and usage, become substance. The seal is substance and changes the nature and operation of the contract. It seems to me therefore, that the question which I have been considering, is settled upon principle against the plaintiff. But however this may be, it has been held as settled upon authority for more than thirty years past.

In the case of *Warren v. Lynch*, 5 Johns. 239, it was conceded by counsel on both sides, and by the court, Chancellor Kent, then Chief Justice, presiding and delivering the opinion, that a sealed note is not negotiable.

In the case of *Clark v. The Farmers' Woolen Manufacturing Company of Benton*, 15 Wendell R. 256, it was held by the Supreme Court of the State of New York, first, that a note for the payment of money under seal, though in all other respects like a promissory note, was not negotiable, and that an action could not be obtained upon it in the name of a person to whom it had been transferred; secondly, that the effect of affixing the seal of a corporation to a contract, is the same as when a seal is affixed to the contract of an individual; it renders the instrument a specialty.

I am not aware that this decision has ever been overruled, or even doubted.

We are therefore of opinion that the plaintiff is not entitled to recover on this action.

SECTION II—GENERAL REQUISITES.

THE INSTRUMENT MUST BE IN WRITING. § 3—1.

Thomas et al. v. Bishop (1734), 2 *Strange*, 955.

The plaintiffs were indorsees of a bill of exchange drawn from *Scotland* upon the defendant, in these words, "At thirty days sight pay to J. S. or order 200*l.* value received of him, and place the same to account of the *York Buildings* company, as per advice from *Charles Mildmay*. To Mr. *Humphrey Bishop*, cashier of the *York Buildings* company, at their house in *Winchester-street, London*. Accepted 13 June 1732. per *H. Bishop*."

This bill not being paid, an action was brought against the

defendant upon his acceptance. And the defendant proved, that the letter of advice was addressed to the company; and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner as he had accepted other bills. But Mr. J. *Page*, who had tried the cause, directed the jury to find for the plaintiff, which they did accordingly.

And now upon motion for a new trial, the court held, that the direction was right. For the bill on the face of it imports to be drawn upon the defendant, and it is accepted by him generally, and not as servant to the company, to whose account he had no right to charge it till actual payment by himself. And this being an action by an indorsee, it would be of dangerous consequence to trade, to admit of evidence arising from extrinsic circumstances, as the letter of advice. And they said, this differed widely from the case of a bill addressed to the master, and under-wrote by the servant; where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of his master. A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. Now here is nothing in writing to bind the company, nor can any action be maintained against them upon the bill; for the addition of cashier to the defendant's name is only to denote the person with more certainty, and the *York Buildings* house is only to inform the order, where the drawee is to be found; and the direction whose account to place it to, is for the use of the drawee only. And they compared it to the case in *Carth. 5. 2 Ven. 307.* where a bill was drawn payable to *Price*, for the use of *Calvert*, and held that the legal property was in *Price*, which is stronger than the present case. They said it might be otherwise if the action had been by *J. S.* who was privy to the transaction, and it had appeared he tendered the bill as a bill on the company. But this plaintiff being a stranger, they could not consider those circumstances. The plaintiffs had their judgment.

THE INSTRUMENT MUST BE SIGNED.

§ 3—I.

Reg. v. Harper, L. R., 7 Q. B. D. (1881), 78.

The following case was stated by Stephen, J:—

John Harper was convicted of forgery before me at Durham assizes under the following circumstances: Messrs. Watson & Son, of Kilmarnock, having supplied Harper with some machinery, drew a bill upon him for the price, and forwarded it to him for acceptance, unsigned by the drawers. It had been arranged that Harper should procure the indorsement of a solvent person, and should himself accept the bill. Harper returned it accepted by himself, and purporting to be indorsed by one Hunt. It was proved that Hunt's indorsement had been forged by Harper. On getting the bill back, Watson & Son indorsed it and paid it into the bank for collection when due. They did not at any time sign it as drawers.

The following is a copy of the bill of exchange:—

“£22 10s. 4d.

“KILMARNOCK, 2 Nov. 1880.

“One month after date pay to me or order the sum of £22 10s. 4d., that being for value received in machinery.

“Indorsed,

“MR. J. HARPER,

“JOHN HUNT.

“Contractor and Builder,

“JOHN WATSON & SON.

“Rutland Street, Pallion,
“Sunderland.”

Across the bill was written “Accepted payable at the Union Bank of London. John Harper.”

The indictment contained six counts, which charged Harper:

1. With feloniously forging a certain indorsement to and on a bill of exchange.
2. With feloniously forging an indorsement to and on a certain paper writing, which said paper writing is in the form of, and purports to be, a bill of exchange, unsigned by any drawer thereof.
3. Feloniously forging a certain indorsement to and on a certain paper writing.

In the 4th, 5th, and 6th counts he was charged with feloniously uttering the documents described in the 1st, 2nd, and 3rd counts.

I was of opinion that all the counts were bad, except the 1st and 4th, but I left the whole matter to the jury.

The jury returned a general verdict of guilty, and I sentenced Harper to be imprisoned with hard labour for nine months, but suspended the execution of the sentence till the decision of this case by the Court for Crown Cases Reserved.

The question for the Court is, whether, under the circumstances stated, Harper was properly convicted of either of the offences charged in the 1st or 4th counts of the indictment, and whether any of the other counts charge a felony?

No counsel appeared upon either side.

LORD COLERIDGE, C.J. The conviction cannot be sustained. The instrument was not a bill of exchange; it was an inchoate bill of exchange. The point requires no authority, though it has the authority of the cases of *McCall v. Taylor*, 34 L. J. (C.P.) 365; *Stoessinger v. South Eastern Ry. Co.*, 3 E. & B. 549; *Peto v. Reynolds*, 23 L. J. (Ex.) 98; 9 Ex. 410; 11 Ex. 418, and *Rex v. Pateman*, Russ. & Ry. 455.

STEPHEN, J. Though I entirely agree with the opinion expressed by my Lord, I cannot help observing that the act of the prisoner had all the effect of a forgery punishable under the statute as a felony; the prisoner could, however, have been indicted, and ought to have been indicted, for forgery at common law.

GROVE, HAWKINS, and LOPES, JJ., concurred.

Conviction quashed.

McCall v. Taylor, 34 L. J. R. C. P. (1865), 365.

Suit on an instrument in the words and figures following:

£300 Four months after date pay to my order the sum of three hundred pounds for value received.

To Captain Taylor,
Ship Jasper.

There was no date to this instrument nor the signature of any drawer; but there was written across it by the defendant these words: "Accepted, William Taylor."

The first count was against the defendant and as the acceptance of a bill of exchange for £300. The second count was on the same instrument as a promissory note, of which the defendant

was alleged to be the maker. There were counts also for goods sold and delivered and on an account stated.

Pleas to the first count—a traverse of the acceptance; to the second—a traverse of the making; and to the residue of the declaration—never indebted.

The learned Judge was of opinion that the instrument could not be declared on either as a bill of exchange or promissory note, and a verdict was accordingly entered for the defendant; but leave was reserved to the plaintiff to move to enter a verdict on either the first or second counts, if the instrument could be declared on as either a bill or note. A rule *nisi* to that effect having been subsequently obtained by *Hannen*, for the plaintiff,—

Day now shewed cause.

Hannen and *Lord*, in support of the rule.

ERLE, C.J.—I am of opinion that this rule should be discharged. The declaration is on a bill of exchange, and also on the same instrument described as a promissory note. The instrument in question was in this form—[The learned Judge read it].—It has no date and no drawer's name; but the defendant wrote his acceptance across it; and the question is, has the holder of such an instrument a right to declare on it either as a bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a promissory note; and there has been no case cited as an authority for its being considered as either a bill or a note. It is, in fact, only an inchoate instrument, though capable of being completed. Let the party who has the authority to make it a complete instrument do so; but if he will not do this, he cannot sue on it. The case of *Stoessiger v. the South-Eastern Railway Company*, 3 El. & B. 549; 23 Law J. (N. S.) (Ex.) Q. B. 293, is directly in point. In the other cases which have been referred to, where effect was given to the instrument, nothing more had to be done to make the instrument complete; and so those cases are distinguishable from the present. The captain may possibly have given his acceptance for the necessities supplied to the ship, and the plaintiff may have had authority to put his name as drawer; but that should have been shewn by his doing so. As it is, he seeks to sue on it without putting his name to it as drawer; and it may be that the reason is, because he never had authority to insert a drawer's name. It is, however, sufficient for us to say that the instrument is inchoate and imperfect; and therefore there is no ground for making this rule absolute.

WILLES, J., BYLES, J., and SMITH, J., concurred.

Rule discharged.

MUST CONTAIN AN UNCONDITIONAL PROMISE OR ORDER. § 3—2.

White v. Cushing (1896), 88 Me. 339, 51 Am. St. Rep. 402.

T. W. Vose, for plaintiff.

J. B. Peaks, for defendant.

FOSTER, J. The plaintiff sues as indorsee of an order signed by the defendant of the following tenor:

"\$120.

DOVER, Oct. 27th, 1893.

Piscataquis Savings Bank.

"Pay James Lawler, or order, one hundred and twenty dollars, and charge to my account on book No. —.

J. N. CUSHING."

"Witness—

"The bank book of the depositor must accompany this order."

The order was indorsed in blank on the back by James Lawler and Samuel Lewis, and the plaintiff claimed to recover against the defendant as upon a negotiable instrument. The real question presented is whether the instrument declared on is negotiable, so that an action may be maintained upon it in the name of the indorsee.

To constitute a negotiable draft or order, it must be a written order from one party to another for the payment of a certain sum of money, and that absolutely, and without any contingency that would embarrass its circulation, to a third party or his order or bearer.

It has often been held that a bill or note is not negotiable if made payable out of a particular fund. But there is a distinction between such instruments made payable out of a particular fund, and those that are simply chargeable to a particular account. In the latter case, the payment is not made to depend upon the adequacy of that fund, the only purpose being to inform the drawee as to his means of reimbursement, and the negotiability of the instrument is not affected by it.

The objection that is raised to the negotiability of this instrument is, not that it is made payable out of a particular fund, but that it is subject to such a contingency as necessarily embarrasses its circulation and imposes a restraint upon its negotiability, by means of these words contained upon the face of the order: "The bank book of the depositor must accompany this order." Although these words are upon the face of the order below the signature

of the drawer, they were there at the time of its inception, became a substantive part of it and qualified its terms as if they had been inserted in the body of the instrument. *Littlefield v. Coombs*, 71 Maine, 110; *Cushing v. Field*, 70 Maine, 50, 54; *Johnson v. Heagan*, 23 Maine, 329; *Barnard v. Cushing*, 4 Metcalf, 230; *Heywood v. Perrin*, 10 Pick. 228; *Benedict v. Cowden*, 49 N. Y. 396; *Costelo v. Crowell*, 127 Mass. 293, and cases there cited.

Was the order negotiable? The answer to that depends upon the effect of the words "The bank book of the depositor must accompany this order." If not negotiable, the plaintiff as indorsee can not maintain an action upon it. *Noyes v. Gilman*, 65 Maine, 589. If their effect is such as constitute a contingency in relation to the payment of the order, dependent upon the production of the drawer's bank book by the holder or indorsee of the order, then they must be regarded as such an embarrassment to the negotiation of the order, and such a restriction upon its circulation for commercial purposes as to render it non-negotiable.

Without these words the order is payable absolutely, and there is no apparent uncertainty affecting its negotiability. With them, the order is payable only upon contingency, or condition, and that is upon the production of the drawer's bank book. This is rendered imperative from the language employed, and the bank upon which the order is drawn, would have the right to insist upon such production of the book in compliance with the terms of the order; and the case shows that it has refused payment upon presentation of the order for the reason that it was not accompanied by the bank book. It cannot, therefore, be regarded as payable absolutely and without any contingency that would embarrass its circulation. The drawer has it in his power to defeat its payment by withholding the bank book. Certainly the bank book of the depositor is within his own control rather than that of the indorsee of this order.

It was the necessity of certainty and precision in mercantile affairs and the inconveniences which would result if commercial paper was incumbered with conditions and contingencies, that led to the establishment of an inflexible rule that to be negotiable they must be payable absolutely and without any conditions or contingencies to embarrass their circulation. *American Ex. Bank v. Blanchard*, 7 Allen, 333. In that case the words, "subject to the policy," being included in a promissory note, were held to render the promise conditional and not absolute, and so the note was

held not to be negotiable. *Noyes v. Gilman*, 65 Maine, 589, 591; *Hubbard v. Mosely*, 11 Gray, 170.

A case in every essential like the one we are considering was before the Supreme Court of Pennsylvania in 1891. A fac simile of the order is given in the opinion. No two cases could be nearer alike. There, as here, the order was drawn on a savings bank. The suit was by the indorsee against the drawer as in this case. There, as here, the order contained a statement upon its face, but below the signature of the drawer, that the "Deposit book must be at bank before money can be paid." In discussing the question of its negotiability cases are cited from the courts of Maine, Vermont, Massachusetts and New York, as well as from Pennsylvania. In the course of the opinion the court say: "It sufficiently appears from the memoranda on its face that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations, in force between it and the depositor, requiring certain things to be done before payment could be required, viz: previous notice of depositor's intention to draw upon the fund, return of the notice ticket with the order to pay, and presentation of the deposit book at the bank, so that the payment might be entered therein." * * * "It is, in substance, merely an order on the dollar savings bank to pay J. W. Quinn, or order, nine hundred dollars in nine weeks from date, or February 1, 1888, provided he or his transferee present to the bank, with the order, the notice ticket, and also produce at and before the time of payment the drawer's deposit book. As already remarked, these are undoubtedly pre-requisites which restrain or qualify the generality of the order to pay as contained in the body of the instrument. They are also pre-requisites with which it may be difficult, if not sometimes impossible, for the payee, transferee, or holder of such an order to comply." *Iron City Nat. Bank v. McCord*, 139 Pa. St. 52 (23 Am. State Rep. 166).

The order in question was drawn upon a savings bank, and it is common knowledge that all such banks in this State have a by-law which all depositors are required to subscribe to, that "no money shall be paid to any person without the production of the original book that such payment may be entered therein."

This court in the case of *Sullivan v. Lewiston Inst. for Savings*, 56 Maine, 507, has considered the purpose and necessity of these salutary regulations. We should be slow to countenance any departure from this rule needed for the protection of depositors in our savings banks now numbering more than 160,000, and where deposits aggregate nearly \$60,000,000.

Inasmuch as this order is not negotiable and no suit can be maintained upon it by the plaintiff as indorsee, it becomes unnecessary to consider the other exceptions.

Exceptions sustained.

SIGNING IN REPRESENTATIVE CAPACITY.

§ 22.

INDICATION OF A PARTICULAR FUND OUT OF WHICH REIMBURSEMENT IS TO BE MADE. § 5—I.

Schmittler v. Simon (1886), 101 N. Y. 554, 54 Am. Rep. 737.

Wm. W. Jenks, for appellant.

Joseph B. Reilly, for respondent.

RUGER, Ch.J. The plaintiff claimed to recover as the holder of a draft, drawn upon and accepted by the defendant, reading as follows:

“NEW YORK, February 26, 1877.

“Mr. Adam Simon, executor, will please pay to Johannes Schmittler or his order, on the first day of July, which will be in the year 1879, the sum of \$900, with seven per cent interest, to be paid besides this amount yearly, July month, and charge the amount against me and of my mother's estate.

“WILLIAM J. SCHAREN.”

Written upon the face: “Accept, Adam Simon, executor,” and indorsed, “Pay to the order of Mary Schmittler, the amount of note.

“JOHANNES SCHMITTLER.”

Upon the trial, after proving the execution of the draft, its acceptance and transfer, and offering to prove the payment of a consideration by the plaintiff to the payee, which was objected to by defendant, and excluded by the court, the plaintiff rested. The defendant thereupon moved to nonsuit upon the ground that the obligation was not binding upon the defendant personally, but he was liable thereon, if at all, in his representative character alone, and that it was payable out of a specific fund, and a recovery thereon, could not be had without proving the existence and extent of such fund. The court thereupon nonsuited the plaintiff, to which decision she excepted. The General Term having affirmed the determination of the trial court, the plaintiff took this appeal.

We think the court below erred as to both of the grounds upon which their judgment proceeded. That the defendant was liable upon the draft, if liable at all, in his individual capacity alone, seems under the authorities to admit of no doubt.

Neither executors nor administrators have power to bind the estate represented by them through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the personal property as owners and have no principal behind them for whom they can contract. The title vests in them for the purposes of administration, and they must account as owners to the persons ultimately entitled to distribution. In actions upon contracts made by them, however they may describe themselves therein, they are personally liable, and in actions thereon the judgment must be *de bonis propriis*. Not so, however, upon contracts made by their testator or intestate; in such case the judgment is always *de bonis testatoris*. (*Gillet v. Hutchinson's Adm.*, 24 Wend. 184; *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Monroe*, 47 id. 360, 366.)

The action here is exclusively upon the undertaking of the defendant, importing a promise to pay the sum of \$900 on the 1st day of July, 1879, to the payee of the draft or his order for a consideration received by the promisor. No facts are alleged or proved, showing any liability on the part of the defendant's testator to the drawee of the draft, or any legal demand existing in his favor, against the estate represented by the defendant.

It follows that the obligation must be held to be the individual contract of the defendant, and enforceable as such by a judgment against him, and execution to be levied *de bonis propriis*, or it is *nudum pactum* creating no liability whatever.

The cases are very numerous to the effect that the addition of an official character, to the signatures of executors and administrators, in executing written contracts and obligations has no significance, and operates merely to identify the person and not to limit or qualify the liability. Thus it was held in *Pinney v. Administrators of Johnson* (8 Wend. 500), that a bond given by administrators in their representative capacity to a creditor for a debt of their intestate, was the individual obligation of the administrators and enforceable against them *de bonis propriis* only; that the description of the obligors in the bond as administrators, and their promise in that character was surplusage, and they were chargeable upon such a bond only in their personal capacity. (See, also, *Gould v. Ray*, 13 Wend. 633.) Parsons on Bills and

Notes, vol. 1, page 161, lays down the rule that "an administrator or executor can only bind himself by his contracts; he cannot bind the assets of the deceased. Therefore, if he make, indorse or accept negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office. Signing a note for example, 'A. as executor of B.' for this will be deemed only a part of his description or will be rejected as surplusage." To similar effect are *Pumpelly v. Phelps* (40 N. Y. 59), *Taft v. Brewster* (9 Johns. 334), *Forster v. Fuller* (6 Mass. 58), *Hills v. Banister* (8 Cow. 31), *Thatcher v. Dismore* (5 Mass. 299), *Cornthwaite v. First Nat. Bank* (57 Ind. 268).

Being of the opinion, therefore, that the defendant is liable upon the draft in question in his individual capacity alone, the question still remains as to the extent of such liability. He was undoubtedly competent to enter into a personal contract in reference to the funds in his possession, and in such case would be bound to perform according to the tenor and legal effect of the obligation assumed by him, and entitled to be allowed the amount paid upon an accounting, as executor. Such instruments are subject to the rules of construction applicable to other contracts, and must be interpreted upon consideration of the language used by the parties, with a view of arriving at their intention in executing them. The court below held that the draft in question was payable only from a particular fund, and was, therefore, non-negotiable, and enforceable only to the extent of the fund referred to.

Considering the question as we are compelled to do from the language of the instrument alone, we are unable to agree to the interpretation thus put upon it. It is not claimed that there is any distinction between the instrument in question and an ordinary bill of exchange except that made by the clause referring to the mother's estate. Unless that clause deprives the paper of its commercial character, the rights and liabilities of the parties thereto must be governed by the rules pertaining to negotiable securities, which would render the defendant liable for the amount named in the draft, upon the theory that his acceptance was an admission by him of assets applicable to its payment.

The distinction between a fund from which the draft or order is directed to be paid, and one referred to as the means of reimbursement to its drawee, is a material one and cannot be disregarded in the construction of such instruments. Thus it is said: "When a reference is made to a special fund merely as a direction to the drawee how to reimburse himself, and the payment

is not made to depend upon the adequacy of the fund, it will not vitiate the bill." (Edw. on Bills and Notes, § 158.) See, also, Parsons on Merc. Law, 87; Chitty on Bills, 158. Dwight, Com., in *Munger v. Shannon*, 61 N. Y. 255, says: "A bill is an order drawn by one person on another to pay a third a certain sum of money absolutely and at all events. Under this definition the order cannot be paid out of a particular fund, but must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee may reimburse himself." Judge Rapallo, in *Brill v. Tuttle* (81 N. Y. 457), says: "If a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts." In that case the drawee refused to accept and the action was sought to be maintained upon the theory of an equitable assignment. It was held under the peculiar circumstances of the case, and the form of the instrument, that it did transfer the fund.

It is thus seen that the mere mention of a fund in a draft, does not necessarily deprive it of the character of commercial paper, but it must further appear in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise.

The question, therefore, to be determined here is, whether the fund in question is referred to as the measure of liability or the means of reimbursement. While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it is mentioned only as the source of reimbursement. No express language in it can be pointed out as requiring its payment from the fund mentioned, and none from which that requirement can be implied, except such as exists, in all drafts where a fund is referred to. Its language is to "charge the amount against me and of my mother's estate" and contains no provision for delay until the amount is realized from the estate, or for payment *pro tanto* in case the estate should prove insufficient to pay the whole amount. There is no language importing a transfer of the fund to the payee, and nothing from which such an intention can be inferred. The draft contains an absolute direc-

tion to pay a fixed sum, at a specified date, with interest. It imports a present indebtedness of a sum named, from the drawee to the payee, and an absolute direction to pay that sum at a fixed date, subject to no contingency either as to time or amount. In express language he directs the amount when paid to be charged against him individually, and adds the words, plainly implying, as we think, that the fund for the acceptor's reimbursement would be found in an amount eventually, or immediately payable to the drawer from his mother's estate.

We think, also, that the insertion of words expressly making the paper negotiable, was quite significant and indicated an intention on the part of all parties, that it should be transferable, and partake of the character of commercial paper. Any contingency inferable from the language of the draft, making the amount payable thereon indefinite and uncertain, would tend largely to depreciate its value for such purpose, and defeat the intention with which it was apparently made.

If the language of the paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him, but as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and we think, should be held to the contract which other parties were authorized by his acceptance to infer he intended to make. The case of *Tassey v. Church* (4 Watts & Sergeant, 346) seems quite in point. The instrument there read:

"\$555.48

ALLEGHENY, 1st July, 1840.

"Please pay Church, McVay & Gordon \$555.48 and charge the estate of Thomas C. Patterson.

"ADAM FLEMMING, *Trustee*."

"To JOHN TASSEY, Administrator.

Indorsed: "Accepted, JOHN TASSEY, Administrator."

Fleming was the trustee of Mrs. Patterson, who was the heir at law of Thomas C. Patterson; Tassey was the administrator of Patterson's estate. It was held that the promise of the acceptor was unconditional and bound him absolutely. In *Childs v. Monins* (6 Eng. C. L. 228), the defendants, as executors of the estate of Thomas Taylor, promised to pay £200 on demand with interest, signing as executors. It was held that they became personally liable, and that the plea of *plene administravit* was no defense. It was further held that the promise to pay interest made the debt that of the administrators personally. In *Kelly v. Brooklyn* (4

Hill, 263), the action was upon an order drawn by the mayor upon the treasurer of defendant in the following words: "Pay Alexander Lyon or order \$1,500 for award No. 7, and charge to Bedford Road Assessment." It was held that it was a bill of exchange and not payable from a particular fund. For further illustration of the point under discussion we would refer to *Hollister v. Hopkins* (13 Hun. 210); *Redmond v. Adams* (51 Me. 429; *Luff v. Pope* (5 Hill, 413). The case of *Tooker v. Arnoux* (76 N. Y. 397) is referred to by the respondent as sustaining the views of the court below; but we are of the opinion that it cannot be so regarded. The order there directed the drawee to pay a certain sum out "of the money to be realized from the sale" of certain houses. This order was accepted, and it was held that a sale of the houses was a condition precedent, to any liability on the part of the acceptor. This was the plain language of the contract.

In all the cases examined by us where an order has been held to operate as an equitable assignment of a fund, there were either special phrases contained in the instrument, indicating an intent to have it so operate, or ambiguous language used, which, construed in the light of surrounding circumstances, justified the inference of a limitation of liability. (*Parker v. Syracuse*, 31 N. Y. 376; *Alger v. Scott*, 54 id. 14; *Munger v. Shannon*, 61 id. 251; *Ehrichs v. DeMill*, 75 id. 370; *Brill v. Tuttle*, *supra.*) Here, however, there is no such language, and this contract is to pay a fixed amount at a specified date, absolutely and unconditionally.

We are, therefore of the opinion that the instrument in question is a bill of exchange and rendered the parties executing it liable absolutely for the amount stated therein.

The judgment of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

Casco Nat'l Bank v. Clark et al. (1893), 139 N. Y. 307. § 22.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Daily, Jr., for appellant.

Edward B. Merrill, for respondent.

GRAY, J. The action is upon a promissory note, in the following form, viz.:

Ridgewood Ice Co.

	BROOKLYN, N. Y., Aug. 2, 1890.
\$7,500.	Three months after date, we promise to
	pay to the order of Clark & Chaplin Ice Company, seventy-
	five hundred dollars at Mechanics' Bank: value received.
	JOHN CLARK, Prest.
E. H. CLOSE, Treas.	

It was delivered in payment for ice sold by the payee company to the Ridgewood Ice Company, under a contract between those companies, and was discounted by the plaintiff for the payee, before its maturity. The appellants, Clark and Close, appearing as makers upon the note, the one describing himself as "Prest." and the other as "Treas.," were made individually defendants. They defended on the ground that they had made the note as officers of the Ridgewood Ice Company and did not become personally liable thereby for the debt represented.

Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bona fide* and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their

names an abbreviation of some official title has no legal significance as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well-settled rule. (Byles on Bills, §§ 36, 37, 71; *Pentz v. Stanton*, 10 Wend. 271; *Taft v. Brewster*, 9 Johns. 334; *Hills v. Bannister*, 8 Cow. 31; *Moss v. Livingston*, 4 N. Y. 208; *De Witt v. Walton*, 9 id. 571; *Bottomley v. Fisher*, 1 Hurlst. & Colt. 211.) It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

It was said in *Briggs v. Partridge*, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged, upon proof that the ostensible party signed, or indorsed, as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances; as in the case of *Mott v. Hicks*, 1 Cowen, 513, where the note read, "the president and directors promise to pay," and was subscribed by the defendant as "president." The court held that that was sufficient to distinguish the case from *Taft v. Brewster*, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation.

In the case of the *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, referred to by the appellants' counsel, the action was against the defendant to hold it as the indorser of a bill of exchange, drawn to the order of "S. B. Stokes, Cas.," and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill, by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff as well as apparent.

Incidentally, it was said that the same strictness is not required in the execution of commercial paper as between banks, that is, in other respects, between individuals.

In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of the obligation, the established and safe rule must be regarded to be that it is the agreement of its ostensible maker and not of some other party, neither disclosed by the language, nor in the manner of execution. In this case the language is "we promise to pay," and the signatures by the defendants Clark and Close are perfectly consistent with an assumption by them of the company's debt.

The appearance upon the margin of the paper of the printed name "Ridgewood Ice Company" was not a fact carrying any presumption that the note was, or was intended to be, one by that company.

It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves, and, apparently to the world, they did so by the language of the note; which the mere use of a blank form of note, having upon its margin the name of their company, was insufficient to negative.

In order to obviate the effect of the rule we have discussed, the appellants proved that Winslow, a director of the payee company, was also a director in the plaintiff bank, at the time when the note was discounted, and it was argued that the knowledge chargeable to him, as director of the former company, was imputable to the plaintiff. But that fact is insufficient to charge the plaintiff with knowledge of the character of the obligation. He in no sense represented, or acted for the bank in the transaction, and whatever his knowledge respecting the note, it will not be imputable to the bank. (*National Bank v. Norton*, 1 Hill, 572, 578; *Mayor, etc., v. Tenth National Bank*, 111 N. Y. 446, 457; *Farmers', etc., Bank v. Payne*, 25 Conn. 444.) He was but one of the plaintiffs' directors, who could only act as a board. (*National Bank v. Norton, supra.*) If he knew the fact that these were not individual but corporate notes, we cannot presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter. (*Bank of U. S. v. Davis*, 2 Hill, 451.) The knowledge with which the bank as his principal would be deemed chargeable, so as to affect it, would be where, as one of the board of directors and participating in the discount of the paper, he had acted

affirmatively, or fraudulently, with respect to it; as in the case of *Bank v. Davis (supra)*, by a fraudulent perversion of the bills from the object for which drawn; or as in *Holden v. New York & Erie Bank* (72 N. Y. 286), where the president of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the president, as an individual or as an executor, was not imputable to the bank merely because he was the president, but because, when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent.

The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank. But no such duty can be deemed to have existed in this case, where the appellants have made and delivered a promissory note, purporting to be their individual promise. If one of the plaintiff's officers did have knowledge, whether individually or as a director of the Clark & Chaplin Company is not material, that the paper was made and intended as a corporate note, his failure to so state to the bank could not prejudice it. It was in no sense incumbent upon him, assuming that he actually participated in the discount (a fact not shown), to explain that the note was the obligation of the Ridgewood Company and not of the persons who appeared as its makers. He was under no duty to these persons to explain their acts, and the law would not imply any. At most, it would be merely a case of knowledge, acquired by a director, of facts not material to the transaction of discount by the plaintiff, and which he was under no obligation to communicate. No other questions require discussion, and the judgment rendered below should be affirmed, with costs.

All concur.

Judgment affirmed.

Munger v. Shannon (1874), 61 N. Y. 251. § 5—1.

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment and order of Special Term, granted upon summary application for judgment against defendant.

The complaint alleged in substance that Livonia A. Gulick, on the 31st day of December, 1868, at Starkey, Yates county, made her promissory note, by which, for value received, she promised to pay to her own order \$2,000, three months after date, at the Central National Bank in the city of New York. There were additional allegations to the effect that the note was indorsed by Nathan Randall and Herrick Munger, and thereupon discounted and held by Wilkin & Hair, bankers, at Dundee, in the same county. That on the 26th day of January, 1869, and before the note came due, L. A. Gulick, by her agent, made her bill of exchange, addressed to the defendant, as follows: "Mr. Harrison Shannon. You will please pay to Messrs. Wilkin & Hair the amount of a note for \$2,000, dated December 31st, 1868, and deduct the same from my share of the profits of our partnership business in malting. Note made by myself as principal to the order of myself, and indorsed by Nathan Randall and Herrick Munger. L. A. Gulick, per E. Gulick. January 26, 1869." That said bill or order was thereupon duly transferred and delivered to the said Wilkin & Hair; and afterward, on the 6th day of February, 1869, the defendant duly accepted said bill or order by writing upon the back of it these words: "Accepted February 6, 1869. H. Shannon;" and therefore became liable upon said bill or order as accepted. It was further alleged that before the commencement of the action the note and bill, or order, were transferred to the plaintiff for a valuable consideration; that the note was due and payable before action brought; and that payment of it, as well as of the bill, etc., was demanded of the defendant, but that no part of the same, or either of them, had ever been paid; and that there was due to the plaintiff thereon \$2,000, with interest from April 3, 1869.

The defendant, in his answer, alleged that, after the acceptance of the order mentioned in the complaint, and before the note matured, L. A. Gulick countermanded the order, and directed the defendant not to pay it; and that before such maturity she requested the holders not to call upon the defendants to pay; and that she then made arrangements to take up and pay the note at

its maturity; and that said note was either paid by the maker at maturity or renewed by another note for the same amount, with the same indorsers; and that the note was thereby paid by the maker.

David B. Prosser, for the appellant.

E. G. Lapham, for the respondent.

DWIGHT, C. It will be necessary to consider whether the instrument on which the action is brought is a bill of exchange. A bill is an order drawn by one person on another to pay a third a certain sum of money, absolutely and at all events. Under this definition the order cannot be paid out of a particular fund, but must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee may reimburse himself. The difficulty is in determining whether the bill is to be paid out of the fund or not. The cases are very numerous, and do not appear to proceed on any very well defined distinction. The true test would seem to be whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he would have the power to charge the bill up to the general account of the drawer, if the designated fund should turn out to be insufficient. In the final analysis of each case, it must appear that the alleged bill of exchange is drawn on the general credit of the drawer. For example, if he were an accommodation drawer, it must be of such a nature that the amount paid under it could be charged against him as a debt, or if the transaction were business paper, it must be of such a character as to be entered as a debit, on the debtor side of the account.

The remarks in *Dawkes v. De Lorane* (3 Wils. 207), are worthy of approval: "The instrument or writing which constitutes a good bill of exchange is not confined to any certain form, or set of words, yet it must have some essential qualities, without which it is no bill of exchange; it must carry with it a *personal* and certain credit given to the drawer, not confined to credit upon any *thing* or *fund*; it is upon the credit of a person's hand, as on the hand of the drawer, the indorser, or the person who negotiates it; he to whom such bill is made payable, or indorsed, takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same." Whatever is said of a bill here is equally applicable to a promissory note. Under this rule, an order drawn payable "out of one's growing subsistence" is not a good bill (*Josselyn v.*

Lacier, 10 Mod. 294) ; nor one payable "out of rents" (*Jenney v. Herle*, 2 Lord Raym. 1361) ; nor out of money in the hands of — ; "nor out of a certain payment when due." (*Haydock v. Lynch*, 2 Lord Raym. 1563.) On the other hand, the statement of a particular fund in a bill of exchange does not vitiate it, if it be inserted merely as a direction to the drawee how to reimburse himself. Thus, an order requesting the defendant to pay to the plaintiff, or order, £9 10s., "as my quarterly half-pay, to be due from the twenty-fourth of June to twenty-seventh of September next, by advance," was held to be a bill of exchange. The court said: "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person." (*Macleod v. Snee*, 2 Strange, 762.) The direction in the case at bar is equivalent to an order to pay out of the profits. It is to *deduct* the amount paid from the drawer's share of "the profits." This is equivalent to a direction to subtract the amount from a particular fund. If the language had been "please pay Wilkes and Hare \$2,000 out of my share of the profits of the partnership," it would have been a clear case of assignment and not a bill of exchange. The actual direction was in substance the same. (*Cook v. Satterlee*, 6 Cowen, 108), is in point. The words there were: "Ninety days after date pay plaintiff or bearer \$400, *and take up their note* given to Wm. and H. B. Cook for that amount, dated April 19th, 1825." On demurrer it was held that this was not a bill of exchange. The words "pay *and take up*," &c., were held to be equivalent to pay *on* taking up. Applying the same construction to the present case, "pay *and deduct*" would be equivalent to "pay *on* deducting," or "pay *by* deducting." Either construction must take away negotiability. *Cook v. Satterlee* is not at all weakened by *Leonard v. Mason* (1 Wend. 522). The opinion is given by the same judge in both cases. The language in *Leonard v. Mason* was, "pay a specified note, and hold it against me in our settlement." The court said the note was thus referred to merely to ascertain the amount. The language was equivalent to the words "charge to my account." In *Leonard v. Mason* there was no independent act to be performed other than paying the note. In *Cook v. Satterlee*, and in the case at bar, there are two wholly distinct acts to be done, besides payment: in the one to take up a note, and in the other to deduct from profits of a firm. The order, accordingly, is not drawn on the general credit of the drawer. (*Lowery v. Steward*, 25 N. Y. 239.) The order there was: "Please pay to the order of Archibald H. Lowery the sum of \$500 on

account of twenty-four bales cotton shipped to you as per bill of lading by steamer Colorado, inclosed to you in letter." It was held that this was not a bill of exchange, requiring acceptance to bind the drawers, but a specific draft or order upon a particular fund. (Pp. 242-244; *Morton v. Naylor*, 1 Hill, 583; *Parker v. City of Syracuse*, 31 N. Y. 376.) The present order, it should be observed, is payable out of an uncertain fund, from profits, and of course, none may be realized. This fact, of itself, deprives it of an element essential in a bill of exchange, which is, that it be payable absolutely, and not upon a contingency. (*Cook v. Satterlee*, 6 Cow. 108; *Worden v. Dodge*, 4 Denio, 159; 1 Parsons on Notes and Bills, 42.)

I think that the true construction of the present order is, that it was an equitable assignment of a certain amount of the profits of the business of L. A. Gulick.

The judgment of the Supreme Court should be reversed.

All concur; except EARL, C., dissenting. LOTT, Ch.C., concurs on the ground that the answer should not have been held frivolous.

Judgment reversed and motion denied.

STATEMENT OF THE TRANSACTION WHICH GAVE RISE TO INSTRUMENT. § 5—2.

Siegel, Cooper & Co. v. Chicago Trust & Savings Bank (1890),
131 Ill. 569, 19 Am. St. Rep. 51.

Mr. John C. Richberg, for the appellants.

Messrs. Flower, Smith and Musgrave, for the appellee.

MR. CHIEF JUSTICE SHOPE delivered the opinion of the court:

This was an action of assumpsit, by appellee, against appellants, upon the following instrument:

"\$300.

CHICAGO, March 5, 1887.

"On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size ——— x ——— inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Co., for a term of three months, from May 15, 1887.

SIEGEL, COOPER & Co."

—which was indorsed by Dalziel, the payee, to appellee, for value, on the day of its execution.

The first question presented is, is this instrument negotiable?—and this question has been answered affirmatively by the Circuit and Appellate courts. The Appellate Court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance granted by that court.

It appears, that before the time when the privilege of advertising was to commence, Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellants; and it is insisted that the instrument is a simple contract, only, and that therefore the same defense—failure of consideration—is available against the indorsee of the paper for value, and before due, as might be interposed against such paper in the hands of the payee. It is also insisted, that the instrument shows, on its face, that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsee took it with notice, and by the failure of the payee to perform the condition, no right of recovery exists in the indorsee. It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated,—that is, it is a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains, whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and, in this instance, amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid. *Daniel on Neg. Inst.* secs. 790-797; *Davis v. McCready*, 17 N. Y. 320; *State Nat. Bank v. Casson*, 39 La. Ann. 865; *Goodloe v. Taylor*, 13 N. C. 458; *Stevens v. Blunt*, 7 Mass. 240.

In *State Nat. Bank v. Casson*, *supra*, it is said: "Plaintiff received the note before maturity, and before a failure of the

consideration. Even if it were known to him that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the defendant and the payee. It can not affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed."

The most that can be said of a recital in the instrument itself, of the consideration upon which it rests, is, that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient, of itself, to advise him that there was, or would necessarily be, a failure of consideration, but if, at the time of the indorsement, the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and, in connection with other facts, amount to notice. (*Henneberry v. Morse*, 56 Ill. 394.) The case at bar does not, however, fall within the rule just stated, for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the 15th of May following,—an interval of seventy days.

There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day, and one payable upon the happening of some event; and the rule is, that where the parties insert a specific date of payment, the instrument is then payable at all events,—and this, although, in the same instrument, an uncertain and different time of payment may be mentioned, as, that it shall be payable upon a particular day, or upon the completion of a house, or the performance of other contracts, and the like. (*McCarthy v. Howell*, 24 Ill. 341, and authorities *supra*.) But the doctrine of this and kindred cases, where there are both a certain day of payment and one more or less contingent, need not be here invoked, for the time of payment in the instrument under consideration is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time, alone.

If, therefore, it be conceded, as it must, that a condition inserted in a promissory note, postponing the day of payment until the happening of some uncertain or contingent event, will destroy its negotiability and render the instrument a mere agreement, yet under the authorities, if by the instrument the maker promises to pay a sum certain at a day certain to a certain person or his order, such instrument must be regarded as negotiable, although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here, the money

was payable, absolutely, on the first day of July, 1887,—a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time, suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was, that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months, from May 15, 1887. Giving to the language employed its broadest possible meaning, it can not be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be, that the contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. *Wade on Notice*, sec. 94 a; *Loomis v. Maury*, 15 N. Y. 312; *Davis v. McCready*, *supra*.

It is also contended that the court erred in giving the eighth instruction in behalf of appellee, as to the meaning of the words "good faith." Without pausing to discuss the instruction, we think it clear that appellants were not prejudiced thereby, and that no inference unfavorable or prejudicial to them could have been drawn therefrom by the jury. While, therefore, the instruction may be regarded as inaccurate, it worked no injury, and appellants can not complain. See *Comstock et al. v. Hannah*, 76 Ill. 530.

Other minor objections are urged, which, it is sufficient to say, we have examined with care, but find no prejudicial error.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE SUM MUST BE CERTAIN.

§ 3—2.

Dodge v. Emerson (1852), 34 Me. 96.

Assumpsit, by the indorsee against the makers of a note payable to the Protection Insurance Company or order, for "\$271.25, with such additional premium as may arise on policy No. 50, issued at the Calais agency."

The opinion of the court, SHEPLEY, C.J., WELLS, RICE, HATHAWAY and APPLETON, J.J., was drawn up by

APPLETON, J.—No principle of law is more fully established by authority and the universal concurrence of the commercial world, than that to make a written promise a valid promissory note, it must be for a fixed and certain, and not for a variable amount. In France it is so determined by the provisions of the Code Napoleon. It is the recognized mercantile law of continental Europe. In England and in this country, it has received the sanction of repeated and well considered adjudications. Story on Promissory Notes, § 20. Without this essential requisite, a written promise, though in terms payable to order, is to be regarded as a simple contract and not negotiable.

The defendants in this case have promised to pay two several sums; one certain and definite, the other uncertain and contingent. The defendants' liability being for both these sums, is obviously for an unascertained and indefinite amount.

It is insisted in argument, that the plaintiff may abandon all claim for the additional premium, which is uncertain, and proceed only for the certain sum expressed in the contract. Undoubtedly he may take judgment for any sum less than the amount due, and in that mode abandon a portion of his legal claims, but that still leaves the contract in its original state, and can in no way affect its legal construction. He could not erase the clause relating to the additional premium, without thereby making such an alteration in the instrument declared on, as would discharge the defendants.

In *Smith v. Nightingale*, 2 Stark. R. 375, the promise was to pay the payee sixty-five pounds and all other sums that may be due him, and it was claimed for the plaintiff, to whom the interest in the contract had passed by indorsement, that he might disregard the latter clause and recover on the certain sum set forth in his contract as indorsee, but the Court decided otherwise. *Davis v. Wilkinson*, 10 Adol. & El. 98.

The inquiry is made by the counsel for the plaintiff, whether the clause providing for the payment of an additional sum, introduced after the promise to pay the sum fixed and certain, controls that sum so as to make it in any event uncertain. The amount due to the plaintiff is uncertain. Whether the contract is to be regarded as a promise to pay one sum, which shall be the aggregate composed of a certain and of an uncertain sum, the amount of which is to be ascertained at some subsequent time, or as a promise to pay two sums, one fixed and the other uncertain, is perfectly immaterial. In either case there is no precise and ascertained amount due by the contract, and it cannot be regarded as a promissory note. If it was not in its origin, it cannot be made one by any abandonment, which the plaintiff may deem it advisable to make of any portion of the sum due him. The contract declared on not being in its character negotiable, the action cannot be maintained by the present plaintiff. *Plaintiff nonsuit.*

MAY BE PAYABLE BY STATED INSTALMENTS. § 4—3.

Cook v. Horn (Q. B.) (1873), 29 L. T. (N. S.) 369.

This was an action upon a promissory note, tried before Honyman, J., at the York Summer Assizes. A verdict of 175*l.* 5*s.* 10*d.* was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him, on the ground that the note was not good.

The form of the note was as follows :

£170.

25th April, 1872.

We promise to pay to Messrs. M. H. Cook and Co. 170*l.*, with interest thereon at the rate of 5*l.* per cent. per annum, as follows: the first payment, to wit, 40*l.*, or more, to be made on the 1st Feb. 1873, and 5*l.* on the first day of each month following until this note and interest shall be fully satisfied. And in case default shall be made in payment of any of the said instalments, the full amount then remaining due in respect of the said note and interest shall be forthwith payable.

The note was signed by the defendant and one John Horn, since deceased.

J. W. Mellor, on behalf of the defendant, moved in pursuance of the leave reserved.—This instrument cannot be considered a

promissory note, for it is not made for the payment of a certain sum at a particular day. If the defendant paid more than 40*l.* on the 1st Feb., which would be in accordance with the terms of his promise, there could be no certainty as to his liability for the remaining instalments concerning either the amount or the day. In *Smith v. Nightingale*, 2 Starkie, 375, the promise was to pay on a particular day a certain sum, with interest, "and also all other sums which may be due to him." Lord Ellenborough was of opinion (p. 376) "that the instrument was too indefinite to be considered as a promissory note; it contained a promise to pay interest for a sum not specified, and not otherwise ascertained than by reference to the defendant's books, and that since the whole constituted one entire promise, it could not be divided into parts. He also held, that since the instrument contained an agreement to pay the money, it could not be receivable in evidence as an acknowledgment without a stamp." Similarly, this note contains a promise to pay interest for a sum the amount of which, after the 1st Feb., is not specified. Moreover, the day of final payment depends upon the contingency of the defendant's first payment; and it has been held that a promissory note cannot be so indefinite, *e. g.*, to pay so many days after marriage. (*Beardsley v. Baldwin*, 2 Stra. 1151.) [Blackburn, J.—That is only when the event may never happen; if the period of payment be inevitable, as upon a death, it need not be definite.] Here there is no statement of the sum upon which interest is to be paid.

BLACKBURN, J.—I do not think there should be any rule in this case. The objection to the note is, that if the first payment were more than 40*l.*, which the note provides it might be, the subsequent instalments and the final time for payment would be indefinite. The amount of the note, however, is certain, and any variation in the time will depend only upon the defendant. No case has been cited which is an authority against this note; and by analogy with other objections, this one, as it seems to me, ought not to prevail. I do not see why a stipulation which enables the maker of a note to reduce his liability for interest, should prevent the instrument containing it from being a promissory note.

QUAIN and ARCHIBALD, JJ., concurred.

Rule refused.

INSTRUMENT PAYABLE *in* EXCHANGE IS NOT NEGOTIABLE. § 4—4.

First Nat. Bank v. Slette (1897), 67 Minn. 425, 64 Am. St. Rep. 429.

Carmody & Leslie and *F. H. Peterson*, for appellants.
Calkins & Sharpe, for respondent.

START, C.J. This action is based upon an obligation, which is substantially in these words:

"\$1,673. HALSTAD, MINN., July 26th, 1894.

"For value received, we promise to pay to the order of the John Good Cordage & Machine Company the sum of sixteen hundred and seventy-three dollars, as follows: Payable by New York or Chicago exchange. \$560, Nov. 15th, 1894; \$560, Dec. 1st, 1894; \$560, Dec. 15th, 1894. Without interest, if paid as due; if not, then legal rate from date until paid."

The only question on this appeal is whether this is a negotiable instrument under the law merchant. It is absolutely essential, in order to constitute a promissory note under the law merchant, that the promise be to pay in money. If this instrument can be construed as an absolute promise to pay in money \$1,673, with exchange, it is negotiable; otherwise, not. *Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968.

The case of *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783, is the only one to which our attention has been called, where the language of the instrument was similar to the one under consideration. In the case referred to the note was made in Chicago, and was payable at New York, "in" exchange; and it was held that the note was negotiable, upon the ground that the promise was to pay the sum named in the note, "with" exchange, which was a mere incident to the debt.

In the case at bar the note is not payable at any particular place, and the promise is, not to pay a given number of dollars in money "with"—that is, plus—the current rate of exchange, but it is to pay the sum named in the note by New York or Chicago exchange. The holder of this instrument cannot demand in payment thereof \$1,673 in money, plus the cost of exchange; for the maker is not bound to discharge his obligation except by means of inland bills on New York or Chicago. Nor can the maker tender in payment \$1,673 in money, with the cost of exchange; for his promise is to make payment by inland bills,

which he must purchase in the market. The instrument, then, is not payable in money, and is, therefore, not a promissory note, within the law merchant. *Easton v. Hyde*, 13 Minn. 83 (90); *Jones v. Fales*, 4 Mass. 245; *Irvine v. Lowry*, 14 Pet. 293; 1 Daniel, Neg. Inst. §§ 55, 56; Tied. Com. Paper, § 29; 1 Rand. Com. Paper, § 90. In reaching this conclusion we have not been unmindful of the fact that, in commercial usage, bills of exchange are regarded as substitutes for money; but this usage cannot make them such.

Order reversed, and a new trial granted.

THE SUM IS CERTAIN THOUGH PAYABLE WITH COSTS OF COLLECTION OR AN ATTORNEY'S FEE. § 4—5.

Oppenheimer v. Bank (1896), 97 Tenn. 20, 56 Am. St. Rep. 778.

Appeal in Error from Chancery Court of Gibson County.

MCALLISTER, J. Complainants filed this bill to enjoin the defendant bank from prosecuting three several suits before a Justice of the Peace, for the collection of certain promissory notes. It is charged in the bill that said notes were procured by fraud and are without consideration, and that the bank received the notes from the payees with actual or constructive notice of the fraud. It is further charged said notes were not negotiable, for the reason that each contained a stipulation for the payment of reasonable attorney's fees, and that said bank is not protected in its title to said notes as an innocent holder for value in due course of trade. The Chancellor, upon final hearing, was of opinion that the defendant bank purchased said notes without actual or constructive knowledge of the fraud, but held that the stipulation in respect of attorney's fees, destroyed the negotiability of said instruments, and thereby defeated the claim of said bank; that it was an innocent holder for value within the meaning of the law merchant. The Court decreed that said notes had been procured by fraud and were void in the hands of defendant bank, and perpetually enjoined their collection. The bank appealed, and has assigned as error the action of the Chancellor in adjudging said notes non-negotiable on account of the stipulation in respect of attorney's fees.

The facts out of which the present controversy has arisen may be briefly stated. The record discloses that Curtis Bros. were

the proprietors of a patent churn, which they were engaged in selling in Gibson County. Complainants purchased of Curtis Bros. the exclusive right to sell this churn in the State of Louisiana and certain counties of Mississippi, for which they agreed to pay the sum of \$2,000, evidenced by four notes, each for the sum of \$500, and payable, respectively, in seven, eight, nine, and ten months from date. The following is a specimen of the notes in controversy, viz.:

"TRENTON, TENN., June 3, 1889.

"Nine months after date we promise to pay to the order of Curtis Bros., or bearer, the sum of five hundred dollars, negotiable and payable at the Exchange Bank of Trenton, Tenn., for value received. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note, and, in case of suit, agree to pay all reasonable attorney's fees for collecting the same.

"\$500 due February 3, 1890.

"L. OPPENHEIMER,

"C. T. LOVE,

"R. F. ROSS,

"H. R. CAMP."

On the twenty-seventh and twenty-eighth of June, 1889, three of these notes were purchased by the defendant bank at a discount of twenty per cent.—that is to say, the bank paid twelve hundred dollars for the three notes of the aggregate face value of fifteen hundred dollars. H. R. Camp, one of the signers of the notes, was in the employment of Curtis Bros. in the capacity of salesman, and negotiated the sale to Oppenheimer of the exclusive right to sell this churn in Louisiana and Mississippi. It was agreed between the original parties, at the time the notes were executed, they were not to be transferred, and were alone payable out of the profits of the new business. Curtis Bros., Camp, and Ames, soon after the execution of the notes, left the state clandestinely, and their whereabouts is unknown. The proof abundantly shows that Curtis Bros. were in collusion with Camp, and that said notes were procured to be executed upon false and fraudulent representations, and as between the original parties there was a total failure of consideration. The defendant bank, however, relies upon the plea of innocent purchaser for value before maturity, in due course of trade, and without notice. Defendant's counsel insist that, complainant not having appealed from the ruling of the Chancellor that the bank had no actual or constructive notice of the fraudulent conduct of the payees in procuring the execution

of the notes, this question cannot be reopened in this court. But this position is manifestly erroneous, since, upon the appeal of the bank, the whole case is open for re-examination, and if the decree in favor of complainant is found correct upon any ground, although incorrect upon the ground assigned by the Chancellor, we should affirm it.

The contention of learned counsel for complainant is that the purchase of the notes in suit from strangers at a discount of twenty per cent., when the bank knew that Oppenheimer, one of the makers, was perfectly solvent, indicates knowledge of the fraud, or that the bank had such constructive notice as to put it upon inquiry. As said by this court: "When the indorsee takes negotiable paper before maturity under circumstances which might reasonably create a suspicion that it was not good—as, where he buys a note on a solvent man, having less than one year to run, for \$333.33 at \$125, with an agreement to pay \$25 more if collected without suit, he takes it at his peril and subject to the equities between the original parties." *Hunt v. Sanford*, 6 Yer., 387; 7 Heis., 163.

Says Mr. Tiedeman, in his work on Commercial Paper, Sec. 291: "It is said that inadequacy of price paid for negotiable paper may be so gross as to justify the conclusion that the purchaser is charged with notice of a fraudulent or defective title on the part of the vendor. And it has been held there was constructive notice of fraud or of some other equally effective defense to the paper where the purchaser paid \$125 for a note of \$333.33, \$50 for a note of \$300, \$5 for a note of \$300. On the other hand, it has been held that the purchaser of a commercial instrument was a holder for value, and hence took it free from equitable defenses, when he paid \$100 for a note of \$250, \$50 for a note of \$100, or \$12.50 for a note of \$25. It is certain that a purely nominal consideration would not make the purchaser a holder for value. And it may be stated, subject to an explanation of terms, that an inadequate price always puts the person upon inquiry and may, certainly, along with other suspicious circumstances, charge him with notice of existing defenses. But every price is not inadequate which is less than the face value of the instrument purchased. Commercial paper of every kind has its commercial value, rising above or falling below par, according to the financial credit of the person liable on it. Only that price is inadequate which falls below the market value, and if the disproportion between the price paid and the market value be very great, it is fair and just to presume that the purchaser had rea-

sonable grounds for suspecting fraud or some other defense to the instrument. Each case must, therefore, stand on its own merits. One-half the face value may, under some circumstances, be a grossly inadequate price, while, under different circumstances, it may be greatly in excess of what the instrument is worth on the market." Tiedeman, Sec. 291.

We think the rule laid down by Mr. Tiedeman is sound, and furnishes an intelligible basis for the determination of what constitutes inadequacy of price in the purchase of commercial paper. We cannot say, however, in view of this rule and the proof in the record, that there was any such gross disparity between the commercial value of the notes and the price actually paid, as to awaken suspicion in the minds of the officers of the bank of any infirmity in the paper. The proof shows that this bank was accustomed, during this time, to discount paper at rates varying from twelve to twenty-five per cent. per annum, and that it had, prior to this time, discounted paper held by these payees on other solvent parties at such rates. It was also insisted in argument that H. R. Camp, one of the makers of the notes, negotiated the sale of this paper to the bank, and that this fact was sufficient to put the purchaser upon inquiry. Nothing can be predicated upon this position, for the reason that it does not distinctly appear from the record whether it was Ames or Camp who sold the notes to the bank. The officers of the bank who purchased the paper, are unable to state which of these parties conducted the transaction, and there is no other proof in the record on the subject. We hold, however, this feature unimportant in this case. We find no facts or circumstances in the record fixing the bank with knowledge, actual or constructive, of the fraudulent character of the paper, and the holding of the Chancellor in respect of this proposition is correct.

The next question presented is whether the stipulation in respect of payment of attorney's fees, written in the face of the note, destroys its negotiability and thus dismantles the note, allowing proof of fraud in its execution. The question presented has given rise to much judicial controversy, and the decisions announced in different states and jurisdictions are by no means reconcilable, and, since the question is one of first impression in this state, we shall, after a review of the authorities, adopt that view which most commends itself to our reason and judgment.

Mr. Tiedeman, in the work already cited, *Commercial Paper*, Sec. 28 (b), says: "Bills and notes, particularly the latter, sometimes contain stipulations that, if not paid voluntarily, the drawer

or maker will pay the attorney and collection fee. It has been much discussed what is the effect of such a stipulation upon the legal character of the instruments to which they are added.

"A few decisions maintain that the stipulation is in the nature of a usurious charge and avoids the whole transaction under the laws prohibiting usury." Citing *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Dow v. Updike*, 11 Neb., 95.

It may be remarked under this head that, in the case of *Parham v. J. J. Pulliam, Exr. etc.*, 5 Cold., 497, this court held that a stipulation in a note to pay attorney's commission for collecting is not usurious. Other decisions hold the stipulation to be void because it is in the nature of a penalty and tends to the oppression of impecunious debtors. But the avoidance of the stipulation on such grounds enables the courts to treat the stipulation as mere surplusage and hold the instrument to be negotiable notwithstanding." Citing 77 Pa. St., 131; 84 Pa. St., 410; 92 Pa. St., 227; 84 N. C., 24; 63 Mo., 23; 64 Mo., 477; 71 Mo., 618, 622, 627; 53 Wis., 599; 27 Minn., 240; 14 Bush, 814; *Meyer v. Hart*, 40 Mich., 517; *Bulloch v. Taylor*, 39 Mich., 138; *Garr v. Louisville Banking Co.*, 11 Bush, 182.

"In a large number of cases the stipulation is held to be valid, but because it renders the gross sum to be recovered on the instrument uncertain, its insertion in a bill or note is declared to destroy its negotiability." Citing *Sweeney v. Thickstrew*, 77 Pa. St., 131; *Woods v. North*, 84 Pa. St., 410; *Johnston v. Spear*, 92 Pa. St., 227; *First National Bank v. Bynum*, 84 N. C., 24; *First National Bank v. Gay*, 63 Mo., 33; *Samstag v. Conley*, 64 Mo., 477; *First National Bank v. Marlow*, 71 Mo., 618; *Storr v. Wakefield*, 71 Mo., 622; *First National Bank v. Gay*, 71 Mo., 627; *Morgan v. Edwards*, 53 Wis., 599; *Jones v. Radtitz*, 27 Minn., 240.

"There are also other cases which not only recognize the validity of the stipulation, but also the negotiability of the paper in which it appears." Citing *Dietrich v. Baylie*, 23 La. Ann., 767; *Overton v. Matthews*, 35 Ark., 147; *Smith v. Muncie National Bank*, 29 Ind., 159; *First National Bank v. Canatsey*, 34 Ind., 149; *Johnston v. Crossland*, 34 Ind., 344; *Smith v. St. Silvers*, 32 Ind., 321; *Wyant v. Parttorff*, 37 Ind., 512; *Hubbard v. Harrison*, 38 Ind., 325; *Wilkes v. Woollen*, 54 Ind., 164; *Sperry v. Harr*, 32 Iowa, 184; *Seatin v. Scoville*, 18 Kan., 435; *Howestien v. Barnes*, U. S. C. C., Kansas, 28 Am. Rep., 406 (S. C., 5 Dillon, 482); *Heard v. Dubuque Bank*, 8 Neb., 10; *Farmers' National Bank v. Rasmusson*, 1 Dakota, 60; *Wilson Sewing Ma-*

chine Co. v. Moreno, 7 Fed. Rep. 806; *Storieman v. Pyle*, 35 Ind., 103. Indiana now prohibits by statute such stipulations in notes unless unconditional. Rev. Stat. (1876), 149.

Mr. Tiedeman remarks that where the amount to be recovered as attorney's fees is explicitly stated in the instrument, it would seem that the sum of money to be recovered on the paper, with the attorney's fees added to the principal and interest, would be as certain as the principal and interest would be alone, for the interest continues to accumulate if the paper is not honored at maturity. When the exact amount of the fee is not stated, only reasonable fees can be recovered, and there may be some ground for objecting to the negotiability of such an instrument. But it would seem that even such an instrument ought to be held negotiable, for the stipulation for reasonable attorney's fees renders the amount no more uncertain than the addition by the law merchant to the principal sum of the costs of protest and the taxed cost of the suit.

Mr. Randolph, in his work on Commercial Paper, Vol. I., Sec. 205, in treating this subject, says: "The effect of a stipulation for attorney's fees or costs of suit contained in a note has been the subject of much consideration, more especially in our Western States. As an agreement and irrespective of usury laws and other statutory prohibitions, such a stipulation is in itself valid." Citing *Meacham v. Penrose*, 60 Miss., 217; *Brown v. Barber*, 59 Ind., 533; *First Nat. Bank v. Breese*, 39 Iowa, 640; *Garver v. Pontorris*, 66 Ind., 191; 42 Ind., 176; 61 Ind., 276; 47 Ind. 559; 85 Ind., 317; *Miner v. Paris Exchange Bank*, 53 Texas, 559. "And the fees so stipulated for may be recovered by the holder of the notes, although not the original payee." Citing *Johnson v. Crossland*, 34 Ind., 334. "And where a stipulation of this sort is contained in a bill of exchange, it has been held to be embraced in the liability assumed by the acceptor." *Bank of British North America v. Ellis*, 2 Fed. Rep., 44; 29 Ind. 158.

"It may be said in general," says the author, "that such a stipulation for fees does not affect the negotiability of the note containing it, even though the stipulation be restricted to the case of suit being brought on the instrument." Citing 1 Daniel Neg. Instrument, 66; 2 Parson's Bills and Notes, 147; *Dietrich v. Baylie*, 23 La. Ann., 767; *Heard v. Dubuque Co. Bank*, 8 Neb. 10, 24; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scoville*, 18 Kan. 433; 7 Fed. Rep., 806; 16 Fed. Rep., 89; *Trader v. Chicester*, 41 Ark., 242; *Gaar v. Louisville Banking Co.*, 11 Bush, 180; *Nicherson v. Sheldon*, 33 Ill., 372; and citing also the Indiana cases;

Davidson v. Vorse, 52 Iowa, 384; *McGill v. Griffin*, 32 Iowa, 445; Randolph on Com. Paper, Vol. III., §§ 1717, 1718; Chitty, 770.

Says Mr. Daniel, in his work on Negotiable Instruments, Sec. 62 (a): "Such instruments should, we think, be upheld as negotiable. They are not like contracts to pay money and do some other thing. They are simply for a payment of a certain sum of money at a certain time, and the additional stipulation as to attorneys' fees can never go into effect if the terms of the note or bill are complied with. They are, therefore, incidental and ancillary to the main engagement, intended to assure its performance or to compensate for trouble and expense entailed by its breach. At maturity negotiable paper ceases to be negotiable in the full commercial sense of the term, as heretofore explained, though it still passes from hand to hand by the negotiable forms of transfer, and it seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency because, when they cease to be current, they contain a stipulation to defray the expenses of collection. Such stipulations do not, we think, render such instruments usurious. The additional amounts are in consideration of additional trouble and expense inflicted on the holder, and not excessive interest for the loan or forbearance of money." The author states further that the cases sustaining the negotiability of such instruments consider that the stipulation in respect of attorneys' fees is valid because it is an indemnification assured by the maker against the consequences of his own act, for, unless in default, he will not have to pay the additional amount; that it is consonant with public policy, because it adds to the value of the paper; has a tendency to lower the rate of discount, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit, and that it does not impair the negotiability of the instrument, for the reason that the sum to be paid at maturity is certain; that commercial paper is expected to be paid promptly; that, if so paid, no element of uncertainty enters into the contract; that it ceases to be negotiable in the full sense of the term if not paid at maturity, and that the additional agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay," etc. 2 Daniel on Neg. Ins. (3d Ed.), Sec. 62.

This doctrine has received the indorsement of such eminent jurists as Mr. Justice Brewer, now an Associate Justice of the United States Supreme Court, who said, in the case of *Scaton v.*

Scoville, 18 Kan., 781, viz.: "It seems to us, therefore, a just conclusion that paper otherwise negotiable is not rendered non-negotiable by a stipulation for the payment of costs of collection, including attorneys' fees, in case suit is brought thereon." Justice Brewer cited with approval the case of *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.), 180 (S. C., 21 Am. Rep., 709), in which it was said, viz.: "The reason for the rule, that the amount to be paid must be fixed and certain, is that the paper is to become a substitute for money, and this it cannot be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due, it ceases to have that peculiar quality denominated negotiability, or to perform the office of money; and hence, anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in nowise affected it until it had performed its office, cannot prevent its becoming negotiable paper."

Upon a careful review of the authorities, we can perceive no reason why a note, otherwise endowed with all the attributes of negotiability, is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt, should be reimbursed by the debtor by whose default the action was rendered necessary and the expense entailed. So far from such a stipulation discounting the negotiability of the instrument, we think, with Mr. Daniel, that it is an indemnification assured by the maker against the consequences of his own act; that it is consonant with public policy because it adds to the value of the paper; has a tendency to lower the rate of discount, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit.

We are, therefore, of opinion the decree of the Chancellor adjudging said notes non-negotiable was erroneous. We hold, however, that these notes being fraudulent in their inception and without consideration between the original parties, the bank will only be entitled to recover to the extent of the sum actually paid by it, to wit, the sum of \$1,200 and interest. In other words, we

hold there was a negotiation of the notes in due course of trade only in extent to the amount actually paid. *Petty v. Hannum*, 2 Hum., 102; *Holeman v. Hobson*, 8 Hum., 127; *May v. Campbell*, 7 Hum., 450; *Green v. Stuart*, 7 Baxter, 422.

The reason of this rule is thus stated by Mr. Daniel, viz.: "When the execution of a bill or note has been induced by fraud, a different rule applies. The *bona fide* holder of it, for value and without notice, is undoubtedly entitled to be protected against a loss which would befall him if the party defrauded were permitted to set up the defense of fraud on the part of the payee against him. But it does not, therefore, follow that he may recover of such party the whole amount, when he has paid a less sum. For his protection and security against loss, it is only necessary that he should be paid back the amount which he was induced to give for the instrument by its appearance of validity, and, therefore, such amount is the limit of his recovery against the drawer or maker who was defrauded into the execution of the instrument. * * *

The paper derives its validity wholly from the circumstances that it has been obtained for value without notice by an innocent purchaser. For his protection, it is maintained in his hands as a legal obligation. The object of the law is to save him from loss, and, to do that, a recovery of the amount he may advance is all that can be required. To go beyond it would be inequitable and unjust to the party after that equally entitled to be protected from loss." Daniel on Negotiable Instruments, Vol. I., Sec. 758.

INSTRUMENT MUST BE PAYABLE IN MONEY. § 3—2.

First Nat. Bank v. Greenville Nat. Bank (1892), 84 Tex. 40.

John Church and Garnet & Muse, for appellant.

Mathew & Newland and Craig & Wolfe, for appellee.

STAYTON, CHIEF JUSTICE. This action was brought by appellee to recover on the following instrument:

"FIRST NATIONAL BANK,
"\$2180. "FARMERSVILLE, TEXAS, April 21, 1887.

"Thomas Wilkerson has deposited in this bank twenty-one hundred and eighty and 00/100 dollars in cks., payable to the order of himself, on the return of this certificate properly indorsed, one day after date.

"L. E. BUMPASS, Cashier."

This instrument was executed by the cashier of the bank, appellant. It is admitted that the abbreviation "cks." means checks, and that the paper came into the hands of appellee under such circumstances as to entitle it to recover if the paper be negotiable. This is the entire case as it is presented to this court.

It is claimed that the instrument sued on is a negotiable certificate of deposit; and if this is true, we are of opinion that plaintiff was entitled to recover; for, notwithstanding some conflict of authority, it seems to us that in accordance with the great weight of authority, as well as reason, such paper when negotiable in form should be considered negotiable in fact and law.

A certificate of deposit is ordinarily defined to be a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the depositor, to the order of the depositor, or to some other person or to his order, and its form must determine its negotiability. For the purposes of this case this definition is sufficiently accurate and comprehensive, and the first question is, whether the instrument sued on can be deemed, within the meaning of the law, or the understanding of mercantile men, a certificate of deposit. To give to an instrument the character of a "certificate of deposit," the deposit on which it is based must be one of *money*; and where this appears to be the case, from the face of the paper, the word "payable" becomes certain as to the mode or medium in which payment must be made; for the law implies, under such a state of facts, a promise to pay money for money deposited, and to pay a sum equal to the deposit.

The instrument before us has the usual form of a certificate of deposit in all respects, except that it shows upon its face that checks, and not money, were deposited. When money is deposited with a bank, not merely for safe keeping, it becomes the property of the bank, and the relation of creditor and debtor arises between them; but when the deposit is of something else than money, this relation can not arise from the mere fact of deposit as on an implied contract. The paper itself informs us that the things deposited were checks; but we are not advised by it whether the sum named in the paper is the sum called for on the face of the checks or their estimated value, but were this otherwise, that would be unimportant in determining the true character of the instrument.

If the word "checks" were used in the sense attributed to it by mercantile men and law writers—"an order upon a bank or banking house purporting to be drawn upon a deposit of funds

for the payment at all events of a certain sum of money to a person named therein, to his order or bearer, and payable instantly on demand"—the inference would perhaps be, that the checks deposited were checks on some bank other than that issuing the paper sued upon, and for the purpose of safe keeping or collection; but in neither event would the relation of debtor and creditor arise from such a deposit. But for the determination of this case we can not indulge in inferences or presumptions other than such as arise as matter of law.

It has frequently been said that certificates of deposit have most of the characteristics of promissory notes, and this seems to be true; but a paper to be entitled to the force and effect which paper of these classes have, whether negotiable or non-negotiable, must contain a promise "in writing by one person to pay another person therein named, or to his order, or to bearer, a specified sum of money absolutely and at all events." Dan. on Neg. Inst., 28. A paper not having these characteristics can not be a certificate of deposit or promissory note. The promise to pay must be either an express promise or such a promise as must necessarily be implied from words used in the instrument; but this implication will not arise simply from the fact that the paper may evidence the indebtedness of its maker to the person to whom it is given.

In certificates of deposit there is sometimes an express promise to pay, but the promise is most frequently implied from the word "payable" used in connection with the acknowledgment of the deposit or receipt of a named sum of money by or for the benefit of the person to whom or to whose order the payment is to be made. The acknowledgment by a banker of the deposit of money by another, nothing further showing that it was a special deposit, is sufficient to show the relation of debtor and creditor between the banker and depositor or person for whose benefit the deposit is made, and the word "payable" used in such a connection must be understood to be used with reference to that relation, and can mean nothing less than that the maker of the paper intends thereby to be understood to promise to pay the sum acknowledged to have been received. The word "payable" in such a connection can have no other application.

If the acknowledgment of the receipt of the money showed that the deposit was made only for safe keeping—as a special deposit—then the word "payable" used in connection with such acknowledgment would certainly not be construed into an absolute promise to pay money, but would be deemed only an agree-

ment to deliver the special deposit, and the paper could not be held to be either a certificate of deposit or promissory note.

The instrument sued on shows clearly that the paper styled "checks" was deposited, and does not show that money was; and it is unimportant whether the sum named in the instrument be the face value of the checks or their estimated value, for the word "payable," used in connection with the acknowledgment of the deposit of something else than money, can not be held necessarily to be the equivalent of any express promise to pay any sum of money. It becomes a promise to pay only when used in connection with words showing an obligation to pay.

Literally, the words "payable to the order of himself on the return of this certificate properly indorsed" are descriptive of the checks received, but the words could never be so considered when they have application to a sum of money deposited generally, and to which they relate. We do not think, however, that these words were used as descriptive of the checks deposited; for the original certificate, made part of the transcript, shows that it was written on a blank form intended for certificates of deposit, and we refer to this matter only to show that the word "payable," when used in such papers, does not always import a promise to pay. The word "payable" is a descriptive word, meaning "capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable" (Webster); and "to pay" means to discharge one's obligation to another. If the obligation be to deliver specific articles or a package of money left on deposit, although the obligation arises from an express promise, this would not, although reduced to writing, constitute a promissory note; nor would a like promise, coupled with an acknowledgment of the deposit of such things, constitute a certificate of deposit; but if the obligation be to pay a certain sum of money absolutely, the maker of the instrument so obligated to pay ought to be held to have promised to pay when he executes such an instrument as that before us would be if the words "in cks." were not in it.

If a promise to pay something could be implied from the instrument, could a promise to pay a certain sum of money be implied? If money had been delivered to the bank by Wilkerson, in the absence of something showing that the parties did not so intend, the money would have become the property of the bank, and the relation of debtor and creditor would have arisen, and the amount of the debt and credit would thus have been fixed; but the instrument shows that checks, and not money, were deposited. Whether mercantile paper passes to a bank on deposit depends

upon the intent of the parties evidenced by their acts; but there is nothing in the record before us, except the instrument sued on, from which the intent of the parties may be ascertained.

If we assume that the checks became the property of the bank, which is the most favorable presumption for appellee, then may or must we imply a promise, if a promise could be implied, to pay the sum named in the paper sued on. Unless we are required by the instrument itself to assume this, no person dealing with the depositor could safely make such assumption. From the words, "Thomas Wilkerson has deposited in this bank twenty-one hundred and eighty and 00/100 dollars in checks," even if it be conceded that title to the paper passed to the bank, we can not assume that the bank became obligated to pay him that sum in money, as must we, did the certificate show that he had deposited that amount of money. The instrument does show that the bank assumed some obligation to Wilkerson; and if it could be held that from it a promise to pay some sum in money might be implied, this would not be sufficient to sustain plaintiff's case; for he must, in order to maintain this action, show not merely that the bank promised to pay something, but that it promised absolutely to pay a certain sum of money to Wilkerson or to his order. That is not shown; hence the instrument is not one which could be made negotiable by any form of words.

In determining whether paper is negotiable, it alone can be looked to; for it is to that alone which persons dealing with it must and have the right to look; and were it shown by extrinsic evidence that the bank bought from Wilkerson checks on another bank for which it agreed to pay him the sum of \$2,180, and that it executed the instrument sued on as the evidence of that debt, still we would be compelled to deny to the instrument the character of a certificate of deposit as well as negotiability.

It may seem that a bank that would put out such paper ought to pay it, on the ground that the form it gave to it may have misled a purchaser; but such considerations can have no weight in determining the liability of parties, for all persons are presumed to know what is negotiable paper and what not; and there are no rules affecting the business of a country which it is more necessary to rigidly enforce than those which relate to mercantile paper. The paper was not negotiable, and the judgment of the court below will be reversed and judgment will be here rendered for appellant.

It is so ordered.

Reversed and rendered.

MUST BE PAYABLE ON DEMAND OR AT A FIXED OR DETERMINABLE
FUTURE TIME. § 3—3.

Glidden v. Henry (1885), 104 Ind. 278, 54 Am. Rep. 316.

From the Henry Circuit Court.

J. H. Mellett and *E. H. Bundy*, for appellant.

J. M. Morris, for appellee.

ZOLLARS, J. For value and before maturity, appellee became the owner of two promissory notes, executed by appellant, one of which is as follows:

"\$750.

NEWCASTLE, IND., April 14, 1883.

"Twelve months after date we, or either of us, promise to pay to the order of George W. Nugen, Jr., seven hundred and fifty dollars, with interest at the rate of seven per cent per annum after date until paid, and attorney fees, value received, without any relief whatever from valuation or appraisement laws, with eight per cent interest from maturity. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note; and further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely, as he or they may see fit, and receive interest in advance, or otherwise, from the maker or endorsers, for any extension or forbearance so made. Negotiable and payable at the Citizens' State Bank of Newcastle.

"J. W. GLIDDEN."

So far as is material here, the other note is the same. Appellee brought this action to recover the amount of the notes, and to foreclose the mortgage given by appellant to secure them.

The questions for decision are presented by the ruling of the court below in sustaining a demurrer to appellant's answers, and the assignment here that that ruling was erroneous.

If the notes are negotiable as inland bills of exchange, the demurrer was properly sustained, because the defences set up in the answers are such as can not be made as against the *bona fide* holder of such paper. We are, therefore, met at the threshold with the question, are these notes negotiable as inland bills of exchange? In section 5506, R. S. 1881, it is provided that "Notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange, and the payees and endorsees thereof may recover, as in case of such bills."

This statute does not provide what shall constitute a promissory note. The term "note" is used, as it was then and still is defined by the authorities, and well understood under the law merchant in the commercial world. *Melton v. Gibson*, 97 Ind. 158.

The sole purpose of the section was to put a limitation upon section 5503, and provide for commercial paper that might circulate free from defences in favor of the maker. This is accomplished by the provision, that if the note be payable at a bank in this State, it shall be negotiable as inland bills of exchange.

The note, then, with the addition prescribed by the statute, must be such as would have been negotiable under the law merchant without any statutory provision. Are the notes in suit such as would have been thus negotiable? A standard author has said: "To learn what qualities are essential to a negotiable promissory note, we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose, the first requisite, that, indeed, which includes all the rest, is *certainty*. This means certainty, * * * Second, as to the person or persons who are to make this payment, and the order and conditions of their liability. * * * Fourth, as to the time when payment is to be made. * * *

It will be seen that the law endeavors to enforce, define, and protect all these certainties as far as possible." 1 Parsons Notes and Bills, p. 30. See, also, 1 Daniel Neg. Inst., section 41. This same general doctrine of the books is recognized by this and all other courts. *Walker v. Woollen*, 54 Ind. 164 (23 Am. R. 639). In this case it was said: "A note, in order that it be negotiable in accordance with the law merchant, must be payable unconditionally and at all events, and at some fixed period of time, or upon some event which must inevitably happen."

Were it necessary, we might cite numerous decisions by this court asserting the general doctrine of certainty as necessary to a promissory note under the law merchant. The difficulty is not as to the general doctrine, but the application of it to each case as it arises.

In the case before us, all parts of the note must be looked to in determining the quality of the paper. There is a promise to pay in twelve months, but that promise is not certain and unconditional. The other clause is, that the time of payment may be extended indefinitely, as the parties may agree. From an inspection of the note, it is impossible to tell when it may mature,

because it is impossible to know what extension may have been, or may hereafter be, agreed upon. No definite time is fixed, nor is the maturity of the note dependent upon an event that must inevitably happen. The condition is not that something may happen, or be done, that will mature the note before the time named, thus leaving that time as fixed and certain, if the thing do not happen, or be not done; but the condition is that the time named may be displaced by another, uncertain and indefinite time, as the parties may agree.

This distinguishes the case from some of the cases cited by appellee, which hold that so long as a definite time of payment, as fixed in the note, remains fixed and certain, the note retains its negotiability, although by certain agreed conditions it may be matured before that time. The case here is, also, distinguishable from another class of cases which hold that the time of payment may be dependent upon an event that must inevitably happen, such as the death of the maker, the coming of the seasons, etc. The precise question involved here has been passed upon by the Supreme Courts of Iowa and Michigan, and in each case it was held that the condition destroyed the negotiability of the note. *Woodbury v. Roberts*, 59 Iowa, 348 (44 Am. R. 685); *Smith v. Van Blarcom*, 45 Mich. 371. See, also, as in point, *Cook v. Satterlee*, 6 Cow. 108; *Gillilan v. Myers*, 31 Ill. 525; *Costelo v. Crowell*, 127 Mass. 293 (34 Am. R. 367).

We conclude from the foregoing that the notes in suit are not negotiable under the statute as inland bills of exchange, and that, therefore, whatever defences appellant might have set up and made available as against Nugen, the payee, he may set up and make available as against appellee. * * *

The judgment is reversed, with costs.

INSTRUMENT MAY BE PAYABLE ON OR BEFORE A FIXED TIME. § 6—2.

Mattison v. Marks (1875), 31 Mich. 421, 18 Am. Rep. 197.

Newton Foster, for plaintiff in error.

Richards & Barnum, for defendants in error.

COOLEY, J. The view of the circuit judge, that the evidence introduced on the part of the defendant tended to show the note in suit to have been paid by Almanson M. Mattison, appears to us untenable. This person, it appears, had a mortgage which cov-

ered the same premises as the mortgage which secured the note in suit. His mortgage he had foreclosed, and had become the purchaser of the property, but to protect his title it was necessary that the prior mortgage should be taken care of. This he could only do by purchasing it, or paying it off; but whichever form the transaction assumed, he would be entitled to be subrogated to the rights of the former holder, and might enforce payment from the parties who were responsible therefor. There is no ground on which the maker and endorser of the note secured by the first mortgage can claim that the taking up of that note by a second mortgagee with whom they were in no way in privity, can operate to release them from their obligation to pay it. Whether the second mortgagee takes a formal assignment or not, such a transaction makes him in equity an assignee, and he is entitled to resort to all suitable remedies to enforce payment. *Russell v. Howard*, 2 McLean, 489; *Downer v. Fox*, 20 Vt. 388.

This view will dispose of the case, unless the defendant is correct in the position he takes, that the paper sued upon is not a promissory note. If it is not, the suit must fail, because the declaration has treated it as such, and is not adapted to the case of any other special contract. The objection to this instrument is, that it promises to pay a certain sum of money "on or before" a day named; and this, it is said, is not a promise to pay on a day certain, and consequently cannot be a promissory note. We are referred to *Hubbard v. Mosely*, 11 Gray, 170, in support of this view. That case certainly seems to support the position of defendant, and it is to be regretted, perhaps, that the learned judge who delivered the opinion did not deem it important to present more fully the reasons that led him to his conclusions, instead of contenting himself with a simple reference to the general doctrine that a promissory note must be payable at a time certain. It seems to us that this note is payable at a time certain. It is payable certainly, and at all events, on a day particularly named; and at that time, and not before, payment might be enforced against the maker. It is impossible to say that this paper makes the payment subject to any contingency, or puts it upon any condition. The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings. It ought

not to be questioned for the sake of any distinction that does not rest upon sound reason, and we can discover no sound reason for the distinction here insisted upon.

The judgment must be reversed, with costs, and a new trial ordered.

GRAVES, Ch.J., and CAMPBELL, J., concurred.

MAY BE PAYABLE AFTER THE OCCURRENCE OF A SPECIFIED EVENT WHICH IS SURE TO HAPPEN, THOUGH THE TIME OF HAPPENING BE UNCERTAIN. § 6—3.

Kelley v. Hemmingway (1852), 13 Ill. 604.

Farnsworth and Ferguson and T. L. Dickey, for appellant.
Glover & Cook, for appellee.

TREAT, C.J. This was an action brought by Hemmingway against Kelley before a justice of the peace, and taken by appeal to the Circuit Court. On the trial, in the latter court, the plaintiff offered in evidence an instrument in these words:

“CASTLETON, April 27th, 1844.

“Due Henry D. Kelley fifty-three dollars when he is twenty-one years old, with interest. DAVID KELLEY.”

On the back of which was this indorsement.

“ROCKTON, May 21st, 1849.

“Signed the within, payable to Moses Hemmingway.

“HENRY KELLEY.”

The plaintiff proved that the payee became of age in August, 1849. The defendant objected to the introduction of the instrument, because it was not negotiable, but the court admitted it in evidence, and rendered judgment for the plaintiff.

Our statute makes promissory notes assignable by indorsement in writing, so as absolutely to vest the legal interest in the assignee. Was the instrument in question a promissory note? To constitute a promissory note, the money must be certainly payable, not dependent on any contingency, either as to event, or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it cannot be considered as a promissory note. Chitty on

Bills, 134. Thus, a promise in writing to pay a sum of money when a particular person shall be married, is not a promissory note, because it is not certain that he will ever be married. *Pearson v. Ganet*, 4 Mod. 242; *Beardsley v. Baldwin*, 2 Strange, 1151. So of a promise to pay when a particular ship shall return from sea, for it is not certain that she will ever return. *Palmer v. Pratt*, 2 Bing. 185; *Coolidge v. Ruggles*, 15 Mass. 387. In all such cases, the promise is to pay on a contingency that may never happen. But if the event on which the money is to become payable must inevitably take place, it is a matter of no importance how long the payment may be suspended. A promise to pay a sum of money on the death of a particular individual, is a good promissory note, for the event on which the payment is made to depend will certainly transpire. *Colehan v. Cooke*, Willes, 393; S. C. 2 Strange, 1217.

In this case, the payment was to be made when the payee should attain his majority—an event that might or might not take place. The contingency might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*. The plaintiff has not the legal title to the instrument. If it presents a cause of action against the maker, the suit must be brought in the name of the payee. The case of *Goss v. Nelson* (1 Burr. 226), is clearly distinguishable from the present. There, the note was made payable to an infant when he should arrive at age, and the day when that was to be was specified. The court held the instrument to be a good promissory note, but expressly on the ground that the money was at all events payable on the day named, whether the payee should live till that time, or die in the interim; and it was distinctly intimated, that the case would be very different had the day not been stated in the note. It was regarded as an absolute promise to pay on the day specified, and no effect was given to the words that the payee would then become of age.

The judgment must be reversed. *Judgment reversed.*

MUST BE PAYABLE TO ORDER OR TO BEARER. § 3—4.

Zander v. New York Security & Trust Co. (1902), 78 N. Y. Supp. 900; Affirmed, App. Div. 81 N. Y. Supp. 1151, without opinion; Affirmed 178 N. Y. 208.

Action by Caroline Zander against the New York Security & Trust Company. Demurrer to complaint overruled.

Wilson, Barker & Wilson, for plaintiff.

Hornblower, Byrne, Miller & Potter, for defendant.

SCOTT, J. It is alleged by the complaint, and admitted by the demurrer, that on or about July 11, 1901, the plaintiff deposited with the defendant the sum of \$500, and received therefor the following certificate or receipt:

"The New York Security and Trust Company, New York, July 11, 1901, has received from Caroline Zander the sum of five hundred dollars, of current funds, upon which the said company agrees to allow interest at the annual rate of three per cent. from this date, and on five days' notice will repay, in current funds, the like amount, with interest, to the said Caroline Zander or her assigns, on return of this certificate, which is assignable only on the books of the company."

Then followed provisions as to the reduction or discontinuance of interest, not material here.

Plaintiff always remained the owner of the certificate; has never assigned it, or any part thereof, or in any way indorsed or transferred it, or any interest therein. Before August 9, 1901, she lost or inadvertently destroyed the certificate, and, though she has diligently searched, she has been unable to find it, and on August 9, 1901, she notified defendant of the loss of the certificate. She has duly demanded of defendant the issue of a new certificate, or the payment of the amount of the deposit. The demurrer is stated to be interposed merely for the purpose of enabling the defendant to insist that the plaintiff shall be required to give the security specified in section 1917, Code Civ. Proc. That section refers to lost negotiable paper, and the question which presents itself is, therefore, whether or not the certificate of deposit given by defendant is negotiable. Section 20, c. 612,

Laws 1897, known as the "Negotiable Instruments Law," declares that an instrument, to be negotiable, "must be payable to order or to bearer," and in this respect is merely declaratory of the law of negotiable paper as it existed before the passage of the statute. The papers which were before the court in the cases principally relied upon by defendant conformed to the foregoing definition, and in each case the decision turned upon the fact that the lost receipts were payable to "order," which circumstance was held to render them negotiable instruments, and to require that indemnity be given before judgment upon them could be rendered. *Frank v. Wessels*, 64 N. Y. 155; *Read v. Bank*, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758. The receipt or certificate in the present case is not negotiable. The money represented by it is payable, not "to order or bearer," but to the plaintiff "or her assigns." It is therefore what is known to the law as a "non-negotiable instrument." In an action upon a lost or destroyed instrument of this description, it is not necessary that the plaintiff should give or tender indemnity. *Wright v. Wright*, 54 N. Y. 437; *Mills v. Bank*, 28 Misc. Rep. 251, 59 N. Y. Supp. 149. The distinction between actions on negotiable and non-negotiable instruments, and the reason for the different rules respecting the necessity for indemnity in such actions, are too obvious, and too clearly stated in the authorities cited, to require restatement here. The demurrer admits that the plaintiff never parted with or assigned the certificate, and that it has been lost or destroyed. Even if the plaintiff had not lost or destroyed the certificate, and has assigned it, the defendant would assume no risk in paying her the amount represented thereby. Section 1909 of the Code of Civil Procedure provides that, except in the case of a negotiable instrument, the transfer of a claim or demand passes an instrument which the transferee may enforce by an action or special proceeding, or interpose as a defense or counterclaim, in his own name, as the transferrer might have done, "subject to any defense or counterclaim, existing against the transferrer, before notice of the transfer." Payment to the plaintiff would be a complete defense to any claim or action by her upon the certificate of deposit, and equally be a defense of any action or claim by a transferee from her, if made before notice of the transfer; and it does not appear, and is not suggested, that defendant has received any notice of a transfer by her. The demurrer must be overruled, with costs and an extra allowance of \$25, with leave to the defendant to withdraw the demurrer and answer within 20 days upon payment of costs.

Demurrer overruled, with costs and extra allowance, with leave to withdraw demurrer and answer within twenty days upon payment of costs.

Westberg v. Chicago Lumber & Coal Co. (1903), 117 Wis. 589.
(See page 460).

DRAWEE MUST BE NAMED OR OTHERWISE INDICATED. § 3—5.

Watrous v. Halbrook (1873), 39 Tex. 573.

Appeal from Travis.

The facts sufficiently appear in the opinion of the court.

Hancock & West, for appellant.

Moore & Shelley, for appellee.

OGDEN, P.J. This suit was brought by the heirs of John S. Storrs against the estate of D. E. Watrous, on the following instrument of writing, viz.:

"\$2,771.62.

MONTEVALLO, June 1, 1858.

"Ten months after date pay to the order of John S. Storrs two thousand seven hundred and seventy-one and 62-100 dollars, value received, and charge to the account of

"D. E. WATROUS.

"To ———, MOBILE, ALA."

The petition charged that for a valuable consideration from John S. Storrs to him thereunto moving, said Daniel E. Watrous executed and delivered to said Storrs the instrument of writing above set out, and that thereby said Watrous undertook, and bound himself, and became liable to pay said sum therein specified.

To this petition the defendants filed a general and special demurrer, which were both overruled by the court, and judgment was rendered for the plaintiffs, and the defendants took their bills of exception to the ruling of the court, and brought the case here by appeal.

The only question now presented for decision is, does this instrument, independent of any allegations of ownership for a

valuable consideration, or promise to pay, give the holder any cause of action.

This instrument is not a promissory note in its ordinary form, nor can it be treated as such, since there is no promise to pay in any event. The instrument is directed to no one, and therefore cannot be considered a draft or bill of exchange. Had it been accepted by any one, that acceptance would have constituted a promise to pay in the acceptor, and then the maker might have become liable as surety or guarantor; but as there is no drawee or acceptor, the maker cannot, without allegations and proof of other facts setting forth and establishing his liability, be held responsible. The instrument, with the exception of the want of a drawee, is in the ordinary form of an accommodation bill or draft, on which the maker cannot be held liable until after an acceptance or non-acceptance. We think the instrument, as it is, is an imperfect bill or draft, for the payment of which no one is liable. With proper averments, showing the objects and purpose of the parties, and that the maker intended to bind himself in the first instance to pay the same, he might possibly be held responsible without a drawee or acceptor, but not otherwise.

We can see no material difference between the writing here sued on and the one in *Ball v. Allen*, 15 Mass. 433, in which the court says: "But the mere possession of a paper drawn in the form of an order, there being no drawee in existence, we think cannot entitle the possessor to an action in any form."

The same doctrine may be drawn from *Petro v. Reynolds*, 9 Exch. 414, and in *Davis v. Clark*, 47 Eng. C. L. 177. From these authorities, and the reason of law governing instruments of this or the like character, we are clearly of the opinion that the petition in this case did not set out a good cause of action, and that the court erred in overruling defendants' special demurrer to the same. We think the demurrer should have been sustained and the plaintiffs permitted to amend their pleadings, that, if desired, they might, by proper averments and proof, establish the liability of the maker or drawer in the first instance, without an acceptance or non-acceptance.

The judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

PROVISION GIVING THE HOLDER AN ELECTION TO REQUIRE SOMETHING TO BE DONE IN LIEU OF PAYMENT OF THE MONEY. § 7—4.

Hodges v. Shuler (1860), 22 N. Y. 114.

Appeal from the Supreme Court. The action was against the defendants as indorsers of the following instrument or note:

"RUTLAND AND BURLINGTON RAILROAD COMPANY.

"No. 253.

\$1,000.

"BOSTON, April 1, 1850.

"In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay in Boston, to Messrs. W. S. and D. W. Shuler, or order, \$1,000, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

"T. FOLLETT, President. SAM. HENSHAW, Treasurer."

At the time the suit was brought there was an unpaid interest warrant attached, and which was attached at the time of indorsement.

The answer of the defendants put in issue none of the allegations in the complaint except those in respect to presentment, notice and protest.

It was admitted on the trial that on the 4th of April, 1854, a notary public in Boston, at the request of the Bank of Commerce of that city (to which bank the plaintiff had sent for collection the note mentioned in the complaint in this action), did present the note at the office, in Boston, of the treasurer of the Rutland and Burlington Railroad Company, the place of business in Boston of said company, and there demanded payment of the same of the treasurer, which was refused; and thereupon notified the defendants thereof by depositing, on the same day, in the postoffice in Boston, a written notice, of which the following is a copy:

"CITY OF BOSTON, April 4, 1854.

To Messrs. W. S. and D. W. SHULER:

"Please take notice that a promissory note made by S. Henshaw, treasurer, for \$1,000, dated April 1st, 1850, payable in four years, in favor of yourselves, and indorsed by you, has been presented by me to the office of the treasurer, and payment being duly demanded was refused, whereupon, by direction of the holder, the same has been protested, and payment thereof is requested of you.

"ADOLPHUS BATES, Notary Public."

This notice was inclosed, and directed to the defendants at Amsterdam, N. Y., their place of residence, and the post office at which they received their letters; and the notice was received by them in due course of mail, and the post mark thereon was "Boston, April 5."

It was further admitted that for some time immediately preceding the date of the note, the defendants were engaged as contractors in building the road of the said railroad company, and on or about the date of said note received from the company, in satisfaction of their contract and work, the said note together with four other notes, each of the same date and amount, and in every respect corresponding with said note, except that the numbers of all the said notes marked thereon, were different each from the other; that the transfer by said defendants of the note mentioned in said complaint was in the city of Boston, and State of Massachusetts, and that each of said notes was transferred by said defendants shortly after the date of the said notes, in the same manner as the note set forth in the complaint; and that Sam. Henshaw (whose name is signed as treasurer to the note mentioned in said complaint) never signed as treasurer or otherwise, any note in which the said defendants were named as payees, except the notes above mentioned.

The court decided that the plaintiff was entitled to recover against the defendants, and gave judgment accordingly. The defendants excepted to the decision as follows:

1st. The court erred in deciding that the defendants were liable upon the instrument set forth in the complaint by their indorsement.

2d. The court erred in deciding that the notice of demand and refusal to pay, served upon the defendants, was sufficient to charge the defendants as indorsers.

3d. The court erred in deciding that the plaintiff was entitled to recover in the action.

The Supreme Court affirmed the judgment, and the defendants appealed to this court.

John K. Porter, for the appellant.

John B. Gale, for the respondent.

WRIGHT, J. The single question is, whether the defendants can be held as indorsers. It is insisted that they cannot, for the reasons, 1st. That the instrument set out in the complaint, is neither in terms nor legal effect a negotiable promissory note, but a mere agreement; the indorsement in blank of the defendants, operating, if at all, only as a mere transfer, and not as an engagement to fulfill the contract of the railroad company in case of its default; and 2d. That if it be a note, the notice of its dishonor was insufficient to charge the defendants as indorsers.

Whether the blank indorsement of the defendants imports any binding contract, depends on the law of Massachusetts; in which state it is to be assumed, from the facts in the case, that the original instrument and indorsement were made. But the law of Massachusetts does not differ from that of this state or of England in any particular material to the present inquiry. In Massachusetts there has been apparently a relaxation of the common law rule so far as to extend the remedy against indorsers to notes payable absolutely in a medium other than cash; but in all other respects the legal rules applicable to negotiable paper, are the same in that state as in our own.

The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock and thus fulfill their promise in either of two specified ways; in such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the

holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed: and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of \$1,000 in four years from date, and its promise could only be fulfilled by the payment of the money, at the day named.

We are next to inquire whether the notice was sufficient. A notice, that in terms, or by necessary implication or reasonable intendment, informs the indorser that the note has become due, and has been presented to the maker, and payment refused, is sufficient. The party to whom the notice is addressed should not be misled by an indefinite or uncertain description of the note and, from the imperfection of the notice itself, be unable to determine to what particular note it refers. A notice which omits an essential feature of the note, or misdescribes it, is an imperfect one, but is not necessarily invalid. It is invalid only when it fails to give that information which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored note, he will be charged. A note is well described when its maker, payee, date, amount, and time and place of payment, are stated; and when a notice sets forth these particulars, with reasonable accuracy, together with the facts of presentment and dishonor, it cannot be rendered invalid by showing *aliunde* that notes similar as to parties, date, amount, and time, and place of payment were outstanding, and were only distinguishable from each other by their numbering.

This notice, which was dated at Boston, informed the indorsers that a promissory note made by S. Henshaw, treasurer, for \$1,000, dated April 1st, 1850, payable in four years, in favor of themselves, and indorsed by them, had been presented on the 4th of April, 1854, at the office of the treasurer, and payment being duly demanded, was refused. The notice contained no allusion to the number of the note, and described it as made by "S. Henshaw, Treasurer." The date, amount, payees, indorsees and time, and, inferentially, the place of payment, were accurately described.

But it is urged that there was a failure to charge the defendants as indorsers, for the reason that there was a misdescription as to the maker, and the notice contained no reference to the number by which the note was designated and distinguished from four others of a similar description, given and transferred by the defendants simultaneously. I think both of the reasons are without force, and that the notice, construed in the light of its attending and surrounding circumstances, was sufficient. At least, from the contents of the notice itself, and the extrinsic facts admitted in the case, it was a question not of law, but of fact, whether knowledge was actually brought home to the indorsers of the dishonor of the note in suit; and that question of fact has been found against the defendants in the court below. Examine, for a moment, the objections to the notice, separately. It describes the note to have been made by "S. Henshaw, treasurer." This was a misdescription, as it was, in fact, made by the railroad company, Henshaw acting as its agent, and signing the instrument in his capacity as treasurer. But did this misdescription deceive or mislead the defendants as to the identity of the dishonored paper? It is very apparent that it did not. Henshaw never signed, as treasurer or otherwise, any note in which the defendants were named as payees, except the five notes given to the defendants on the 1st April, 1850, for \$1,000 each, payable in four years from date, for labor performed as contractors in constructing the road of the company. It is admitted that these five notes were given in satisfaction of their contract with the railroad company. They knew its financial officer, the treasurer, and that the five notes dated April 1st, 1850, became due and payable in Boston on the 4th April, 1854; and they are to be presumed not to have indorsed any like notes of the company, or have had any indorsement outstanding on any note, except the five, which resembled them in any one important feature. Upon the receipt, therefore, by due course of mail, of the notice dated and mailed at Boston on the 4th April, 1854, and describing the note accurately as to date, amount, payees, and time and place of payment, and giving the name of one of its signers, whom the defendants knew was the treasurer of the railroad company, they were fully informed that such notice referred to one of the five notes. At all events, it was a question of fact, whether the information had been actually given to them, and whether they were reasonably apprised of the particular paper upon which they were sought to be charged.

Secondly, as to the objection founded on an omission in the

notice to designate the number of the note sued on. It seems that the note designated in its margin as No. 253, and the notice omitted to describe it by the number. But this did not render the notice *per se* fatally defective. The number was not a part of the note, and there was a complete description of it without the number. It cannot be, that when a notice actually describes every essential feature of a dishonored note, such notice may be invalidated, by an indorser showing, *aliunde*, that there were similar notes indorsed by him simultaneously, and distinguishable only by their different numbers. All that the holder of a note is bound to do is, to give the indorser a complete description of it, and if from such description it cannot be identified, it is the fault or misfortune of the indorser in having indorsed several notes alike in every essential feature. Showing, in this case, that there were four other notes given to the defendants by the railroad company, on the 1st April, 1850, and shortly afterwards transferred by them by indorsement, like the one in suit except that they were differently numbered, did not, as matter of law, stamp the notice as a defective and insufficient one. Indeed, these extrinsic facts were quite immaterial, without showing further that the four notes were transferred to persons other than the holder of the note in suit, and that they were outstanding in April, 1854. The latter facts were not to be presumed, with the view of invalidating the notice, or imposing the onus upon the plaintiff to identify, by extraneous evidence, the note in suit to the defendants as the one referred to in the notice as dishonored.

I am of the opinion that the action was well brought against the defendants as indorsers of a negotiable promissory note, and that the notice of its dishonor was sufficient.

The judgment of the Supreme Court should be affirmed.

All the judges agreed that the instrument in suit was a promissory note; DENIO and WELLES, Js., dissented on the ground that the notice of non-payment was insufficient in omitting the number upon the margin of the note.

Judgment affirmed.

PRESENCE OF SEAL ON INSTRUMENT.

§ 8—4.

See *Conine v. The Junction and Breakwater R. R. Co.*, p. 33.

Brown v. Jordhal (1884), 32 Minn. 135, 50 Am. Rep. 560.

Plaintiff brought this action in the district court for Freeborn County, as holder of the following instrument:

"TOWNSHIP OF MANCHESTER, Feb'y 23, 1881.

"\$120. Six months after date, (or before, if made out of the sale of Drake's horse hay fork and hay carrier,) I promise to pay James B. Drake or bearer one hundred and twenty dollars.

"Negotiable and payable at the Freeborn County Bank, Albert Lea, Minn., with ten per cent. interest after maturity until paid.

"OLE J. JORDAHL. [Seal.]

"Witness: J. WILLIAMSON."

[Seal.]

At the trial before FARMER, J., the plaintiff, having introduced evidence that he bought the note from Williamson for value, before maturity, in good faith and without notice of any defence to it, admitted that the note was obtained from defendant by Williamson by fraud, and that as between those parties the note was without consideration and fraudulent. The court thereupon directed a verdict for defendant; a new trial was denied, and the plaintiff appealed.

Dr. R. P. Hibbs and *John Whytock*, for appellant.

Lovely & Morgan, for respondent.

GILFILLAN, C.J. (DICKINSON, J., because of illness, took no part in the decision.) The defendant executed an instrument in the form of a negotiable promissory note, except that after and opposite the signature were brackets, and between them the word "seal," thus, "[Seal.]" The question in the case is, is this a negotiable promissory note, so as to be entitled to the peculiar privileges and immunities accorded to commercial paper? The rule that an instrument under seal, though otherwise in the form of a promissory note, is not (certainly when executed by a natural person, however it may be when executed by a corporation) a negotiable note, entitled to such privileges and immunities, is universally recognized, and is not disputed in this state. But the appellant contends that merely placing upon an instrument a

scroll or device, such as the statute allows as a substitute for a common-law seal, without any recognition of it as a seal in the body of the instrument, does not make it a sealed instrument. Undoubtedly, where there is a scroll or device upon an instrument, there must be something upon the instrument to show that the scroll or device was intended for and used as a seal. The scroll or device does not necessarily, as does a common-law seal, establish its own character. Such words in the *testimonium* clause as "witness my hand and seal," or "sealed with my seal," would establish that the scroll or device was used as a seal. No such reference in the body of the instrument was necessary in the case of a common-law seal. *Goddard's Case*, 2 Coke Rep. 5a; 7 Bac. Abr. (Bouvier's Ed.) 244. Nor is there any reason to require it in the case of the statutory substitute, if the instrument anywhere shows clearly that the device was used as and intended for a seal. It would be difficult to conceive how the party could express that the device was intended for a seal more clearly than by the word "seal," placed within and made a part of it. This was an instrument under seal.

Order affirmed.

INDORSEMENT AFTER DISHONOR MAKES INSTRUMENT PAYABLE ON
DEMAND AS TO SUCH INDORSER. § 9—2.

Leavitt v. Putnam (1850), 3 N. Y. 494, 53 Am. Dec. 322.

Appeal from the superior court of the city of New York, where the action was against Putnam and others, as the indorsers of a promissory note. The plaintiff was nonsuited on the trial, and after judgment he appealed to this court.

J. W. Gerard, for appellant.

S. Sherwood, for respondent.

HURLBUT, J. On the 29th day of August, 1844, Messrs. J. W. & R. Leavitt made their note for \$1570.52, payable to the order of T. Putnam & Co. (the defendants) eight months after date. A few days after the maturity of the note, the defendants indorsed it as follows: "Pay the within to A. Thacher, value received, May 21, 1845. T. Putnam & Co." Thacher indorsed without recourse, and delivered the note for a valuable consideration to the American Exchange Bank, in whose behalf this action is brought.

On the trial the defendants urged, among other grounds of objection to the plaintiff's recovery, that the defendants' indorsement was in effect a new draft payable to Thacher only, and not negotiable, so that no action could be maintained upon it in the name of the plaintiff. In this they were sustained by the court, and the plaintiff was nonsuited.

The other objections taken by the defendants on their motion for a nonsuit were not considered by the court below, and under the circumstances of the case can not be noticed on this appeal; so that the only thing for us to consider is, whether the indorsement of a note made after due, differs from one made before maturity in respect to its negotiability? It was conceded on the argument that no express authority could be found sustaining the distinction upon which the decision of the superior court was based, but it was urged that the defence could be sustained upon the principle that a dishonored note loses its mercantile character, and its indorsement becomes an original contract which must be made expressly negotiable in terms, or it could not be held to possess the character of negotiability. There is unquestionably a difference between the indorsement of a note after due and one while it is running to maturity, but this relates only to a single point arising from the necessity of the case, to wit, the time of payment, which, in the latter indorsement, is fixed at a future day by the express agreement of the parties, while in the former, it is declared by law to be within a reasonable time, upon demand. But in all other respects the contract is the same as an indorsement in the usual course of trade; and it is difficult to perceive how the single difference referred to can at all affect the negotiability of the indorsement. A bill or note does not lose its negotiable character by being dishonored. If originally negotiable it may still pass from hand to hand *ad infinitum* until paid by the drawer. Moreover the indorser after maturity writes in the same form and is bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. Thus the paper preserves its mercantile existence and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument or seems to exist in the case, which warrants the court in treating the ordinary indorsement of a dishonored bill or note as without the law merchant and

not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and notice, there was perhaps reason enough to sustain the decision of the court below. But since both the note and its indorsement, by a long course of decisions, have been treated as within the law merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill and is equally negotiable. (*Edie v. The East India Co.* 2 Burr. 1216; *Milford v. Wolcott*, 1 Ld. Raym. 574; *Allwood v. Hazelton*, 2 Baylies' S. C. R. 457; *Bishop v. Dexter*, 2 Conn. R. 419; *Berry v. Robinson*, 9 John. 121.)

The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants' indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words "or order," the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefore was effectual to transfer the note to the plaintiff. (*Chitty on Bills*, 136; *Story on Prom. Notes*, § 139.)

I am of opinion that the judgment of the superior court should be reversed, and a new trial awarded.

Judgment reversed.

PAYEE MUST BE INDICATED WITH REASONABLE CERTAINTY.

§ 10—6.

Gordon v. Lansing State Bank (1903), 133 Mich. 143.

Error to Ingham; Wiest, J. Submitted December 2, 1902. (Docket No. 125.) Decided May 12, 1903.

Assumpsit by John R. Gordon against the Lansing State Savings Bank to recover the balance of a deposit. From a judgment for plaintiff, defendant brings error. Affirmed.

Charles F. Hammond, for appellant.

Russell C. Ostrander, for appellee.

MOORE, J. This case was tried by the circuit judge without a jury. At the request of the defendant, he made a finding of facts, which is as follows:

"Monday morning, December 9, 1901, at about 9 o'clock, there was presented at the bank of defendant at the City of Lansing for payment the following check, made upon the printed form of check supplied by defendant to its patrons, and signed by plaintiff, viz.:

" 'LANSING, MICH., . . . , 190.. No. . . .
 " 'LANSING STATE SAVINGS BANK OF LANSING.
 " 'Pay to the order of
 Nine Hundred and Seventy Dollars. \$970.00.
 "JOHN R. GORDON."

"The check was indorsed by Charles P. Downey, and was presented by an employé of Mr. Downey, and cash was paid at the time of its presentation.

"The plaintiff had been a depositor at defendant's bank at periods for three or four years, and at the opening of the bank on the morning of December 9, 1901, his balance or credit upon the books of the bank was \$3.40, but during the day \$2,997.50 was added to plaintiff's credit. The day defendant cashed the check plaintiff was at the bank, and was informed that the check for \$970 had been cashed by payment to Mr. Downey, and he then notified defendant he would not accept that check as a voucher for the money paid.

"December 14, 1901, plaintiff prepared and presented to defendant his check, payable to himself, for \$970, being the amount he claimed to then have on deposit in the bank. Payment on this check was refused by defendant upon the ground that plaintiff had no funds in the bank."

The Circuit Judge rendered a judgment in favor of the plaintiff for \$970 and interest. The case is brought here by writ of error.

Two questions are discussed by counsel: *First*, the effect of not dating the check; *second*, has the check a payee? We do not deem it necessary to discuss the first question. As to the second question, it will be noticed the drawer of the check did not name a payee therein, nor did he leave a blank space where the name of a payee might be inserted, nor did he name an impersonal payee. In the case of *McIntosh v. Lyle*, 26 Minn. 336 (3 N. W. 983), the court used the following language:

"A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to 'Bills Payable' or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words 'or order' indicates an intention that the paper shall be negotiable, and the mention of an impersonal payee,

rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement,—that is, that it shall be payable to bearer. So, when a bill, note, or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a *bona fide* holder may then recover on it.

"These cases differ essentially from the one at bar. In the latter case the person to whom delivered is presumed, in favor of a *bona fide* holder, to have had authority to insert a name as payee. In the former cases the instrument is, when it passes from the hands of the maker, complete, in just the form the parties intend. But in this case there is neither a blank space for the name of the payee, indicating authority to insert the payee's name, nor is the instrument made payable to an impersonal payee, indicating a fully completed instrument. It is claimed that the words 'on sight' are such impersonal payee. They were inserted, however, for another purpose,—to fix the time of payment,—and not to indicate the payee. It is clearly the case of an inadvertent failure to complete the instrument intended by the parties. The drawer undoubtedly meant to draw a check, but, having left out the payee's name, without inserting in lieu thereof words indicating the bearer as payee, it is as fatally defective as it would be if the drawee's name were omitted."

See, also, *Rush v. Haggard*, 68 Tex. 674 (5 S. W. 683); *Prewitt v. Chapman*, 6 Ala. 86; *Brown v. Gilman*, 13 Mass. 160; *Rich v. Starbuck*, 51 Ind. 87; Norton, Bills & N. (3d Ed.) p. 59, and notes; 1 Daniel, Neg. Inst. § 102.

The case differs from the one at bar in some respects, but the important part of the decision is that a payee is necessary to make a complete instrument, and, even though the maker of the check may have intended to name a payee, if he has not in fact done so the check is incomplete. In the case at bar the failure to name a payee was not an oversight, if we may judge from what Mr. Gordon did, as will appear more in detail later.

Our attention has been called to *Crutchly v. Mann*, 5 Taunt. 529. In this case the bill of exchange was made payable to the order of The court found that, under the facts shown, the conclusion was irresistible that the name was filled in with the consent of the drawer. The same case was previously reported in 2 Maule & S. 90 (*Crutchley v. Clarence*), where, as the case then stood, it appeared the bill of exchange had been sent out, the defendant leaving a blank for the name of the

payee. One of the judges was of the opinion that the defendant, by leaving the blank, undertook to be answerable for it, when filled up in the shape of a bill of exchange; another judge was of the opinion that it was as though the defendant had made the bill payable to bearer; while the third judge was of the opinion that the issuing of the bill in blank without the name of the payee was an authority to a *bona fide* holder to insert the name.

In the case of *Harding v. State*, 54 Ind. 359, a promissory note was drawn, leaving a blank space for the name of the payee; and it was held:

"So the name of the payee may be left blank, and this will authorize any *bona fide* holder to insert his own name.' Pars. Notes & B. 33."

In the case of *Brummel v. Enders*, 18 Grat. 873, promissory notes, blank as to the names of the payees, has been put in the hands of an agent to be sold for the benefit of the makers. The agent sold them, at a greater discount than the legal rate of interest, to purchasers who did not know they were sold for the benefit of the makers. At the time of the sale the names of the purchasers were inserted, either by the purchasers or by the agent, in the blank left for the payee. When the notes were sued, the makers pleaded usury. The court, following the cases already cited, held that any *bona fide* holder of a bill or note which is blank as to the name of the payee may insert his own name, and thus acquire all the rights of the payee.

It will be observed that the case at bar differs from all of these cases. As before stated, not only did Mr. Gordon fail to insert the name of a payee, or to leave a blank where the name of the payee might be inserted, but he did more; he drew a line through the blank space, making it impossible for any one else to insert therein a name, indicating very clearly that he not only declined to name a payee, but intended to make it impossible for any one else to do so. Had Mr. Gordon issued a check otherwise perfect, but with the blank space for the amount of the check unfilled, and delivered it to a third person, it would be presumed the third person was given authority to fill the blank space. But had he, instead of leaving the space a blank, filled it by drawing a line through it, would any one say the third person might then insert a sum of money in that space? If not, upon what principle may the name of a payee be inserted when the space was filled in the same way, or upon what theory may it be presumed there was an impersonal payee when the maker has not made the check payable to cash, or some other impersonal payee? In order to

construe the check as a complete instrument, we must read into it an intention not only not expressed by its language, but contrary to the act of the maker. The check, as it appears today, is without any payee. The record is silent in relation to whom it was delivered, or whether the person who presented it at the bank or the person whose indorsement it bears was a *bona fide* holder.

Judgment is affirmed.

HOOKEE, C. J., concurred with MOORE, J.

CARPENTER, J. I regret that I cannot concur in the opinion of my Brother MOORE. I agree with him that the check in question is not governed by the authorities which hold that, where a blank is left for the insertion of the name of a payee, the instrument is to be treated as payable to bearer. I cannot agree, however, that the case of *McIntosh v. Lytle*, 26 Minn. 336 (3 N. W. 983), is controlling. That case resembles this in many particulars. There is, however, a difference which, in my judgment, renders the reasoning of that case inapplicable. The fact that the plaintiff in the case at bar used the ordinary blank, and drew a line through the space intended for the name of the payee, prevents our assuming, as did the court there,—and its decision was based on this assumption,—that it is “the case of an inadvertent failure to complete the instrument intended by the parties.” The instrument under consideration is obviously complete, in just the form the maker intended.

In my judgment, the authorities which hold a check payable to the order of an impersonal payee to be valid and negotiable control this case. I quote from the case of *Willeys v. Bank*, 2 Duer, at page 129:

“One of the checks was payable to the order of 1658, the other three to the order of bills payable; and, as the required order could not in either case possibly be given, the checks, unless transferable by delivery, were payable to no one, and were void upon their face. The law is well settled that a draft payable to the order of a fictitious person, inasmuch as a title cannot be given by an indorsement, is, in judgment of law, payable to bearer. *Vere v. Lewis*, 3 Term R. 183; *Minet v. Gibson*, Id. 481; *Gibson v. Minet*, 1 H. Black. 569, affirmed in the House of Lords. And it seems to us quite manifest that in principle these decisions embrace the present case. At any rate, the bank, by certifying the checks as good, is estopped from denying that they were valid as drafts upon the funds of the maker, and, consequently, were payable to

bearer. The giving of such a certificate, if otherwise construed, would be a positive fraud."

In *Mechanics' Bank v. Straiton*, 3 Abb. Dec. 269, a check payable to bills payable or order was held payable to bearer, the court saying:

"By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without indorsement,—i. e., in the same manner as if it had been made payable to bearer."

We must decide that the check in the case at bar, like those in the cases cited, is either altogether void, or is transferable by delivery. I submit that we should follow those cases, and decide that it is transferable by delivery. To quote the language of Lord Ellenborough, in *Cruchley v. Clarence*, 2 Maule & S. 90:

"As the defendant has chosen to send the bill [check] into the world in this form, the world ought not to be deceived by his acts."

This view of the case compels me to notice the fact that the check under consideration is not dated. According to the weight of authority, this omission does not invalidate it. See Zane, Banks, § 152; 2 Daniel, Neg. Inst., § 1577; Norton, Bills & N. (3d Ed.), p. 405, note.

I think the judgment of the court below should be reversed, and a judgment entered in this court for the defendant.

GRANT, J., concurring with CARPENTER, J.

MONTGOMERY, J., did not sit.

INSTRUMENT PAYABLE TO ORDER OF FICTITIOUS PERSON. § 11—3.

Shipman v. Bank (1891), 126 N. Y. 318, 22 Am. St. Rep. 821.

The nature of the action and the facts, so far as material, are stated in the opinion.

William Allen Butler, for appellant.

Elihu Root, for respondents.

O'BRIEN, J. This appeal brings here for review a judgment of over \$223,000, recovered by the plaintiffs against the defendant, upon a state of facts fully found and stated by the referee in his report, and in regard to which there is little, if any, serious dispute between the parties. The form of the action is for the recovery of a sum of money which, it is claimed, the defendant undertook, when accepting the plaintiffs' deposits, to pay to them or upon their order and direction. It has been found, and is admitted on both sides, that on the 7th of April, 1884, the plaintiffs had upon deposit to their credit with the defendant the sum of \$14,499.08. That from this date to the close of business, on the 3d day of October, 1888, the defendant had and received, to and for the use of the plaintiffs, various other sums of money deposited from time to time between these dates by the plaintiffs with the defendant amounting in the aggregate to six million, two hundred and thirteen thousand, five hundred and eighty-six dollars and seventy-one cents. That between the 7th day of April, 1884, and the close of business, on the 3d day of October, 1888, the defendant paid to the order of the plaintiff on their checks, drawn against the balance above stated and the deposits subsequently made, various sums of money amounting in the aggregate to six million, thirty thousand and forty dollars and twenty-nine cents. This would leave a balance due to the plaintiffs by the defendant of one hundred and ninety-eight thousand and forty-five dollars and fifty cents, which, with interest, is the sum that constitutes the subject of this controversy. The defendant alleged in its answer that all moneys deposited with it by the plaintiffs were fully paid upon their order and by checks drawn upon it by them, and in order to meet and disprove the plaintiffs' claim that there was due to them from the defendant at the close of business, on the 3d day of October, 1888, the sum of one hundred and ninety-eight thousand and forty-five dollars and fifty cents, the defendant produced twenty-seven checks, all signed by the plaintiffs and drawn upon

the defendant, directing the payment of sums respectively aggregating the total balance above mentioned, and to recover which the plaintiffs brought the action. That the defendant actually paid these checks is not disputed, and the case is thus made to turn upon the question whether they are available to the defendant as lawful vouchers, establishing the fact that the moneys claimed by the plaintiffs were paid out by the defendant upon these checks according to the order and direction of the plaintiffs. A clear understanding of the question involved requires a brief statement of the facts and circumstances under which the twenty-seven checks were signed by the plaintiffs and presented to and paid by the defendant. The plaintiffs are a well known law firm in the city of New York, engaged in an extensive business which, in its organization, had a department known as the "Real Estate Department." In this branch of their business they examined titles for clients who were lenders of money on bond and mortgage, carried out and completed such loans, and occasionally examined titles for clients who were purchasers of real estate. One of the members of the firm had general charge of this department, but the details of the business and the execution of the work was entrusted to subordinates. One James E. Bedell, a lawyer who had been admitted to the bar in the year 1868, and had been in the employ of the plaintiffs since 1873, assisting in the real estate department, was, in the year 1881, practically put in charge of the work of this department under the direction of the member of plaintiffs' firm who had general charge. Bedell was an experienced and capable lawyer. The plaintiffs believed that he was honest and trustworthy, and, prior to the discovery of the very extraordinary crimes in connection with these checks, they had no reason whatever to suspect or distrust him. During the period covered by the transactions in question the plaintiffs employed one Dodge, a competent expert bookkeeper, who took charge of the plaintiffs' books and acted as cashier. He kept the account between the plaintiffs and defendant. He filled out all the checks and made all the entries in the check-books, and the checks, when paid by defendant, came to him with the pass-book, which was balanced by the defendant, and the vouchers, including the checks in question, returned with the book, from time to time, at frequent intervals. The course of the business in which the checks in question were issued was substantially as follows: The plaintiffs' client who wished to make a loan through them, furnished the money, which went directly into the plaintiffs' general bank account with the defendant. Against the sum to be loaned and thus put to the

plaintiffs' credit checks were filled up by Dodge, the cashier, from a written statement made by Bedell, showing the amount required to pay liens or charges on the property to be mortgaged, the amount of the plaintiffs' charges, and any other items entering into the transaction, and the balance to be paid the borrower. After filling up the checks Dodge would take the check-book, with the filled-up checks, to a member of the firm for signature, showing him the entries in the check-book of the deposit of the client's money and the statement of Bedell as to the payments to be made, and thereupon the check would be signed by the plaintiffs, in the name of the individual partner to whom it was presented by Dodge, the firm name being engraved on each check and the individual signature underwritten. Dodge would then take away the check-book and deliver the several checks to Bedell. In this manner the twenty-seven checks in question were entrusted by the plaintiffs to Bedell, their clerk, for delivery to the payees, respectively, therein named, who were in good faith believed by the plaintiffs to be real persons, entitled to receive the amount of said checks, respectively, from them or their clients. The defendant paid the checks to a third person, upon an indorsement thereon of the payees named, forged by Bedell, who converted the proceeds to his own use. The names of the payees written in sixteen of the twenty-seven checks, drawn for sums aggregating \$112,818.72, were not the names of real but fictitious persons. The remaining eleven checks, drawn for sums aggregating \$85,227.08, were made payable to the order of real persons, whose indorsements were in every case forged by Bedell. Only three of the checks, drawn for less than \$2,400, were paid to Bedell by defendant. All the others were deposited, from time to time, in various other banks in the city of New York, and the money thereon received by Bedell from these banks, and the checks all ultimately paid by defendant through the exchanges in the clearing house, in the due and regular course of business. As to the sixteen checks payable to the order of fictitious persons, the plaintiffs were led by fraudulent contrivances and representations on the part of Bedell, the details of which appear in the record, to believe, and they did in fact believe, until the discovery of the forgeries, that such payees were real persons; and as to all the checks, the plaintiffs did not intend that any of them should go into circulation or should be paid by the defendant otherwise than through a delivery to and indorsement by the payee named therein. The checks were paid in every case by the defendant, without any inquiry as to the genuineness of the indorsements, and in reliance

upon the responsibility of the parties presenting the same, and not in reliance upon anything done or forbore by the plaintiffs, except that they were signed by them. There is no claim that, at the time the defendant paid the checks, it had any knowledge or suspicion or reason to suspect that any of the indorsements were forged, or that any of the names were fictitious, or that there was any fraud or irregularity in respect to any of the checks or any indorsement or writing thereon. The plaintiffs' confidence in Bedell and his representation of them in all their dealings with clients, concerning loans on real estate, continued without interruption, until one of these clients, upon examining a fabricated mortgage sent to him by Bedell, had his attention arrested by the faintness of the impression of the seal of the register on the certificate of record that he sent the mortgage to the register's office for a better sealing. This led to the discovery of all the frauds, forgeries, fabrications of documents, attestations and official certificates carried on by him in the plaintiffs' office for more than four years. The plaintiffs did not discover that the indorsements on the checks had been forged, or that the amount thereof had not been paid to them or their order, until nearly four months after May 22, 1888, which was the date of the last check so forged. On the discovery of the facts and before the commencement of this action, the plaintiffs tendered the checks to the defendant, and demanded that the amount of the same should be paid to them, or credited in their account by the defendant, which tender and demand was refused.

The various deposits of money made from time to time by the plaintiffs with the defendant created the relation of debtor and creditor, and the law implies a contract on the part of the defendant to disburse the money standing to the plaintiffs' credit only upon their order and in conformity with their directions. The defendant is not entitled to charge against the plaintiffs' account any sums as payments unless they have been made to such persons as the plaintiffs directed. Such payments as were made without the order of the plaintiffs of their funds by the defendant, afford to it no protection when called upon by the plaintiffs to account for the money deposited. Payments made upon forged indorsements are at the peril of the bank unless it can claim protection upon some principle of estoppel or by reason of some negligence chargeable to the depositor. These rules are so familiar and so well established and illustrated by the adjudged cases that a bare reference to them is all that is needful here. (*Crawford v. West Side Bank*, 100 N. Y. 53; *Ætna Nat. Bank v. Fourth Nat. Bank*,

46 id. 86; *Corn Exchange Bank v. Nassau Bank*, 91 id. 80; *Phoenix Bank v. Risley*, 111 U. S. 125; *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106; *Marine Bank v. Fulton Bank*, 2 Wallace, 256; *First Nat. Bank v. Whitman*, 94 U. S. 347; *Citizens' Nat. Bank v. Importers & Traders' Bank*, 119 N. Y. 195.)

The statement of the account made by the defendant to the plaintiffs from time to time, the balancing of the bank pass-book and the return of the same to the plaintiffs with the vouchers, including, as they did, the checks in controversy, with the forged indorsements thereon, constitute no obstacle to the maintenance of this action by the plaintiffs as they were ignorant of the facts and circumstances under which the checks were issued and put in circulation. An account thus stated can always be opened upon proof of mistake or fraud, and the only effect of the plaintiffs' silence as to the correctness of the account rendered by the defendant is to put upon them, in this action, the burden of showing that the account, as stated, was the result of fraud or mistake, a burden which they have fully assumed and met, as the referee has found.

It is urged that the plaintiffs owed the duty to the defendant of examining the vouchers returned to them with the balanced pass-book from time to time, and that a careful examination of the same would have disclosed the fact that the money was received upon the checks by Bedell and his forgeries thus detected. The duty of examining the returned vouchers was delegated by the plaintiffs to their cashier and bookkeeper, who was a faithful and competent person for many years in plaintiffs' employ. The referee found as a fact, from all the circumstances of the case, that the failure to discover the forgeries sooner than they were was not, in any case, caused by any neglect on the part of the plaintiffs or their cashier, of any duty that the plaintiffs owed to the defendant. The examination of the checks would, of course, enable the plaintiffs to ascertain whether their own signature was genuine, and whether the amount, date or name of the payee had been changed, but would not necessarily enable them to detect the forgery of the payee's name. The law imposed no duty upon the plaintiffs to do more than they did to ascertain whether the indorsements on the checks were genuine. The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guar-

anty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine. (*Weisser v. Denison*, 10 N. Y. 68; *Welsh v. German American Bank*, 73 id. 424; *Frank v. Chemical Nat. Bank*, 84 id. 209; *First Nat. Bank v. Whitman*, 94 U. S. 347; *Leather Mfg. Bank v. Morgan*, 117 id. 107.) The plaintiffs committed the examination of the vouchers when returned from the bank to a faithful and competent cashier, who failed to discover the forged indorsements. There is not the slightest reason to believe that if the checks had been examined by one of the plaintiffs themselves the results would have been any different. We are unable to see that anything was done or omitted by the plaintiffs with respect to the examination of the indorsements upon the vouchers that excuses the defendant from its obligation to pay upon a genuine order only. Nor can we perceive anything done or omitted by the plaintiffs in the general conduct and management of their business, or in the employment of and confidence reposed in Bedell that estops them from alleging that the twenty-seven checks were paid without their authority.

Whether the plaintiffs were guilty of any negligence in that regard was a question of fact and the finding is that they were, in so far as the defendant was concerned, reasonably prudent and careful and that the payment of the checks was not caused by any negligence on their part and we do not think it can be said that the finding is without evidence. Moreover, it is found that the defendant paid the twenty-seven checks, in each case, without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the persons presenting the same for payment, and not in reliance upon anything done or forborne by the plaintiffs, except the fact that the checks had been drawn by them; and, further, that all the checks except the three paid directly to Bedell, and amounting to less than \$2,400, were presented to the defendant by, and paid to banks perfectly solvent, and liable to respond to the defendant for all moneys paid upon the forged indorsements. These findings, supported as they are by the evidence, dispose of much of the argument upon which it is sought to establish the proposition that the plaintiffs are, by reason of their own acts and omissions, estopped from claiming that the checks were paid by the defendant without their authority. The facts upon which an estoppel must always be based are found against the defendant. Bedell in issuing the false checks and

fabricating the false papers to conceal his crime, did not act as the plaintiffs' agent and his acts in this regard are not binding upon them nor are they in any manner affected by his knowledge of the facts. The questions that arise in this case and are so ably and elaborately discussed in the briefs of counsel, with respect to the examination of the returned checks and pass-book, the manner in which the plaintiffs' business was conducted and the degree of care and supervision that was exercised over their subordinates, how far the plaintiffs are bound by the criminal acts and knowledge of their clerk as well as the general rule of estoppel, when applied to this class of cases, are not new. They have been frequently and fully discussed in the numerous cases in this court, involving the rights and duties of banks and depositors, and it would extend this opinion beyond reasonable limits, and serve no useful purpose, to go over the ground again. (*Frank v. Chemical Nat. Bank, supra*; *Welsh v. German American Bank, supra*; *Weisser v. Denison, supra*; *People v. Bank of N. A.*, 75 N. Y. 547; *Leather Mfg. Bank v. Morgan, supra*; *Mayor, etc., v. Bank of England*, L. R. [21 Q. B. D.], 160.)

It is enough to state our general conclusion that, with respect to all these points, the defendant has failed to establish any defense to the action.

It is claimed by the defendant that the sixteen checks made payable to the order of persons having no existence were, in legal effect, payable to bearer. It is provided by statute that paper made payable to the order of a fictitious person and negotiated by the maker has the same validity "as against the maker and all persons having knowledge of the facts, as if payable to bearer." 1 R. S. 768, § 5.

We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person. (*Irving National Bank v. Alley*, 79 N. Y. 536; *Turnbull v. Bowyer*, 40 id. 456; *Vagliano v. Bank of England*, L. R. [22 Q. B. D.], 103; *S. C.*, on app. 23 id. 243; *Armstrong v. Pomeroy National Bank*, 46 Ohio St. 512; [7 *Railway & Corporation Law Journal*, 114]; *Gibson v. Minet*, 1 H. Black. 569.)

The findings of the referee that the plaintiffs in good faith believed that the names of the payees represented real persons,

entitled to receive from them the amount of the check in each case, having been led to believe this by the fraudulent contrivances of Bedell, and that they intended that Bedell should deliver the check to a real payee therein named and that they did not intend that they should go into circulation or be paid by defendant otherwise than through a delivery and indorsement by the payee named; and that plaintiffs gave no authority to Bedell to indorse the name of the payee, or to put the checks into circulation, and that no one in fact relied on any appearance of authority, derived from the plaintiffs, in Bedell to indorse the payee's name upon the checks or to put them in circulation, disposes of the question. The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged.

Bedell of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals. (*Frank v. Chemical Nat. Bank, supra*; *Weisser v. Denison, supra*; *Welsh v. German American Bank, supra*; *Cave v. Cave, L. R. [15 Ch. Div.], 643, 644.*)

The case presents another and peculiar question. It seems that ten of the eleven checks which were made payable to the order of real persons were made good by Bedell to the several payees, and the defendant has set up these facts in its answer as a partial equitable defense. The referee made no findings on the subject, but Bedell so testified and was not contradicted, and the question arises upon a request by the defendant to find in substance that the amount of these ten checks having been made good by Bedell to the several payees, the plaintiffs having sustained no loss by reason of the payment thereof, are not entitled to recover in this action against the defendant any sum on account of or by reason of the payment by defendant of the same. The request was refused and the defendant excepted. Keeping in view the theory of this action and regarding the evidence before the referee, we cannot perceive that there was any error in refusing the request.

Bedell testified, in substance, that at the time of the commencement of the action the plaintiffs were liable to clients to the

extent of \$264,000 on account of his frauds. There were \$200,000 in fabricated mortgages which had been delivered by Bedell to clients on account of an equal sum of money paid by the clients to plaintiffs for investment, and which Bedell had converted to his own use. The \$64,000 was obtained through other frauds upon clients which the plaintiffs were liable to be called upon to make good. One of the plaintiffs testified that his firm had actually paid to clients on account of Bedell's frauds over \$242,000. It was not shown by what funds or in what manner Bedell made good to the payees the amount of the checks intended for them. None of the money paid by him was traced to the defendant. The plaintiffs' action was not upon the checks, nor for damages by reason of their payment, but on defendant's implied promise to pay the money deposited to the plaintiffs or upon their order. The plaintiffs' case was made out without the checks at all, except so far as they were necessary as proof to open the account stated. In substance the referee was asked to hold that by reason of the payment by Bedell of the amount of the checks to the persons named therein, without any reference to the source from which the money came, they were to be charged to the plaintiffs the same as if paid by their authority. The proof given did not justify this conclusion. As it was not shown that such payment was made at the expense or to the injury of the defendant, or that the plaintiffs were benefited by it, beyond their whole loss, the cause of action stated in the complaint was not affected by the fact. It is, no doubt, true that payment or indemnity to the payees of checks diverted as these were, made by the wrong-doer, might, under certain circumstances, constitute a basis for equitable relief in an action of this kind, but the proof did not go far enough to warrant it in this case.

The very recent case of *Vagliano v. Bank of England* occupied such a prominent place in the discussion of the questions involved in this appeal by the courts below, and it is now so earnestly pressed upon our attention by the learned counsel for the defendant as a controlling authority in support of his views that we consider it necessary to refer to it and point out, so far as we can, the rule or principle which it decides. In the magnitude of the sum involved, the boldness and ingenuity with which a clerk perpetrated a stupendous fraud upon his employer, and, in many other respects, that case, doubtless, bears a very strong resemblance to this. The question there was whether the defendant was entitled to debit the plaintiff, one of its depositors, with forty-three forged bills of exchange, amounting in the aggregate

to 71,500 pounds, which it had paid, upon a genuine acceptance by the plaintiff, but procured by fraud under substantially the following circumstances: Vagliano, the plaintiff, was a merchant and foreign banker in London, with correspondents in various parts of the world and transacting an enormous business with the defendant, his general banker. He employed in his office a considerable number of clerks, and among them one Glyka, who had charge of the foreign correspondence. One Vucina, a merchant and banker at Odessa, was, and for thirty years had been, one of Vagliano's correspondents, transacting with him a large business and having practically unlimited credit. For many years he had drawn drafts for large amounts, when necessary, upon the plaintiff, payable sometimes to his own order, but more frequently to the order of a payee named therein. The course of business in the office was well known to Glyka, who procured specimens of Vucina's letters of advice, which always preceded the drafts, and specimens of the drafts themselves. Having done so he had paper prepared identical in general appearance and texture with that upon which Vucina's genuine letters and bills were written. This enabled him to forge letters of advice and drafts with Vucina's name as drawer, which he executed with extraordinary skill, and in each case he wrote upon the face of the bill, as payees, the name of C. Petridi & Co., a firm who carried on business at Constantinople, and had business relations with Vucina, but had no connection whatever with the fabricated drafts. Glyka caused these forged letters of advice and drafts to be laid before Vagliano, his principal, who, being deceived by the skillful manner in which the papers were prepared and the confidence he reposed in his clerks, wrote a genuine acceptance on the face of each bill as it was put before him from time to time during a period of some four months, payable in every case at the Bank of England. These fabricated bills, having been thus accepted, were placed with the other and genuine bills in a box in the office to be delivered according to the usual course of business to the proper party when called for. Glyka stole the bills from the box, forged the indorsement of the payees thereon, presented them at the counter of the bank and received the money thereon. By the English Bills of Exchange Act of 1882 (45 and 46 Vict., Ch. 61, § 7, subd. 3), it was enacted with reference to bills of exchange, that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." The bank defended upon two grounds—first, that they were protected by this statute, and secondly, that the plaintiff was guilty of such negligence as pre-

cluded him from claiming that the payment made upon these bills were without authority. On the trial of the action before Mr. Justice Charles, the plaintiff recovered. (L. R. [22 Q. B. D.], 103.) On appeal, the judgment was affirmed, the master of the rolls alone dissenting, on the ground that the bank was protected by the Bills of Exchange Act. (L. R. [23 Q. B. D.] 243.) Thus far the view of the courts in both hearings were in harmony with the contention of the plaintiffs in the case at bar, both as to the construction of the statute and the facts bearing on the question of negligence. The judgment, however, has recently been reversed by the House of Lords, and we have been furnished with copies of the opinions given upon the final decision of the appeal, and have given to them the careful consideration which the high authority of the tribunal from which they emanate and the importance of the case seems to demand. The main point upon which the case turned in the review by the House of Lords, as we understand the opinions, was the construction to be given to the Bills of Exchange Act. It was held, contrary to the opinions below, that whenever the name inserted as payee is without any intention that payment shall be made only in conformity therewith, the payee then becomes a fictitious person within the meaning of the act, and, therefore, the forty-three bills were within the statute, though Petridi & Co. were in fact existing and real persons. When this conclusion was reached, the plaintiff's case necessarily failed, as it was but another way of stating that the bank paid the fabricated bills according to their legal tenor and effect and according to the plaintiff's directions, that is, to bearer. It is hardly necessary to add that if we could follow that case in giving construction to our statute, the same result would follow in this case. But it is quite obvious that we cannot. The language is different. Our statute is a codification of the common law, while the English statute is, and was intended to be, a departure from it. In so far as the opinions deal with the facts of the case upon the question of negligence, it is difficult to deduce from them any abstract rule or principle. Moreover, there is, as it seems to us, a material difference in some respects between the facts of that case and the one at bar. Vagliano, through the contrivances of his clerk, had put before him a fabricated bill, the spurious character of which he failed to detect, and he fixed to it a genuine acceptance, thereby accrediting it to the bank as a genuine instrument. He left the bill thus accepted in a place where the dishonest clerk could easily purloin it. The manner in which the business was conducted was such as to enable the clerk to possess

himself of the means whereby the fraud was successfully carried out without check or detection. The view of the case taken in the opinions delivered in the House of Lords, aside from the question of the construction of the statute, may very well be attributed to a different shading in the facts, and to the further consideration which can be inferred from the record, that that tribunal is not confined, as we are, to a review of the courts below upon questions of law only. For these reasons, the *Vagliano* case cannot be regarded as authority adverse to the conclusion at which we have arrived in this. We have examined the other exceptions appearing in the record to which our attention has been directed, and we are of the opinion that none of them can be sustained.

The judgment should be affirmed.

All concur, GRAY, J., in result.

Judgment affirmed.

FILLING UP BLANKS.

§ 16.

The Bank of Pittsburg v. Neal et al. (1859), 22 How. (63 U. S).
96.

This case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was an action brought by the bank upon two bills of exchange, one dated on the 18th of August, 1857, at Pittsburgh, drawn by L. O. Reynolds & Son upon J. S. & R. E. Neal, at Madison, Indiana, requesting them to pay, four months after date of this second of exchange, (first unpaid,) to the order of L. O. Reynolds, at the Ohio Life Insurance and Trust Company, at Cincinnati, in the State of Ohio, two thousand one hundred and sixty-eight dollars. Reynolds endorsed this bill to L. Wilmarth & Co., who endorsed it to the bank. The bill was accepted by J. S. & R. E. Neal.

The other bill sued upon was similar in all its circumstances, except that it was dated on the 1st of August, 1857, payable four months after the date of this second of exchange, (first unpaid,) for thirteen hundred and fifty dollars. It was endorsed and accepted like the other.

In order to present a distinct view of the transactions which led to this suit and the nature of the defence, it seems necessary

to state particularly all the bills mentioned in the proceedings, designating each bill by a letter, which is the reporter's mark, and used for easy reference.

In June, 1857, J. S. & R. E. Neal, residents of Madison, Indiana, for the purpose of raising money, delivered to L. O. Reynolds, of Pittsburgh, the four following bills, viz.:

Exchange for \$—.

— after — of this first of exchange, (second unpaid,) pay to the order of L. O. Reynolds — dollars, value received, without any relief from valuation or appraisement laws.

To —.

Accepted: J. S. & R. E. NEAL.

(This bill we will call A.)

Exchange for \$—.

— after — of this first of exchange, (second unpaid,) pay to the order of L. O. Reynolds — dollars, value received, without any relief from valuation or appraisement laws.

To —.

Accepted: J. S. & R. E. NEAL.

(This bill we will call B.)

Exchange for \$—.

— after — of this second of exchange, (first unpaid,) pay to the order of L. O. Reynolds — dollars, value received, without any relief from valuation or appraisement laws.

To —.

Accepted: J. S. & R. E. NEAL.

(This bill we will call C.)

Exchange for \$—.

— after — of this second of exchange, (first unpaid,) pay to the order of L. O. Reynolds — dollars, value received, without any relief from valuation or appraisement laws.

To —.

Accepted: J. S. & R. E. NEAL.

(This bill we will call D.)

With these bills, instructions were sent to Reynolds to have them filled up for sums not less than \$1,500, nor more than \$3,000 each, to have them discounted at Pittsburgh, and remit the proceeds to J. S. & R. E. Neal, at Madison, Indiana.

In July, 1857, four other bills like the preceding were sent to Reynolds. These last bills were sent to Reynolds at his request, and intended for his use, as accommodation acceptances of the Neals.

These bills we will call E, F, G, H.

A was filled up by Reynolds as follows: Date, July 1st; amount, \$1,965; time, four months; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Mechanics' Bank of Pittsburgh. Reynolds failed to remit the proceeds according to instructions. When the paper matured, the defendants, as acceptors, paid it.

B was filled up as follows: Date, July 10th; time, four months; amount, \$2,035; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Merchants and Manufacturers' Bank of Pittsburgh. The proceeds of this bill were remitted by Reynolds to the defendants. Before the commencement of this suit, the Merchants and Manufacturers' Bank, as holder and owner of the bill, recovered judgment on it against the acceptor in the Jefferson Circuit Court of the State of Indiana. C and D were for the present retained by Reynolds in his own possession.

E, being similar to A, was filled up as follows: Date, July 30th; time, four months; amount, \$2,450; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Merchants and Manufacturers' Bank of Pittsburgh, Reynolds retaining the proceeds. The holders of this bill brought suit against the defendants, as acceptors, in the Jefferson Circuit Court, Indiana, which action was still pending when the pleas in this case were filed.

F, being similar to B, was filled up by Reynolds as follows: Date, July 24th; time, four months; amount, \$2,750; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Citizens' Bank of Pittsburgh, Reynolds retaining the proceeds. John Black & Co. became the holders, and after its maturity, and before the commencement of this suit, they recovered judgment against the acceptors of the bill for its full amount in the Jefferson Circuit Court of Indiana.

Thus the bills A, B, E, F, being the first of exchange, (second unpaid,) are accounted for. What became of G and H, the record did not show. Let us now account for C and D.

C was filled up as follows: Date, August 1st; time, four months; amount, \$1,350; drawers and drawees, as above.

D was filled up as follows: Date, August 18th; time, four months; amount, \$2,168; same drawers and drawees. These bills were both negotiated to the Bank of Pittsburgh, and were the ones sued on in this case. It will be observed that they were both second of exchange, (first unpaid,) and that the sums of money

did not correspond in amount with any of those for which the first of exchange had been filled up, nor in date, time, or place of payment.

There were four counts in the declaration, and eight pleas, which were all demurred to except the plea of the general issue. It is not necessary to state these pleadings, because they were only intended to raise the questions of law which arise from the statement of facts given above. The court overruled the plaintiffs' demurrers, so that judgment went for the defendant; and upon this ruling upon the demurrers, the case was brought up by the plaintiff to this court.

Mr. Stanton and Mr. Walker, for plaintiff in error.

Mr. Thompson and Mr. Dunn, for defendants.

Mr. JUSTICE CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Indiana. All of the questions presented in this case arise upon the pleadings and the facts therein disclosed. It was an action of assumpsit, brought by the plaintiff in error as the holder of two certain bills of exchange, against the defendants as the acceptors. An amendment to the declaration was filed after the suit was commenced. As now exhibited in the transcript it contains four counts. Two of the counts were drawn up on the respective bills of exchange, and are in the usual form of declaring in suits, by the holder of a bill of exchange against the acceptor. Those contained in the amendment are special in form, setting forth the circumstances under which the respective bills of exchange were drawn, accepted, and negotiated, and averring that these acts were subsequently ratified by the defendants. To the merits of the controversy the defendants pleaded the general issue, and filed seven special pleas in bar of the action. Demurrers were filed by the plaintiff to each of the special pleas, which were duly joined by the defendants, and after the hearing, the court overruled all of the demurrers. Those filed to the pleas responsive to the first and second counts were overruled upon the ground that the pleas were sufficient, and constituted a good bar to the action; but those filed to the fifth, sixth, seventh, and eighth pleas were overruled, upon the ground that the third and fourth counts, to which those pleas exclusively applied, were each insufficient in law to maintain the action. Whereupon, the plaintiff abiding his demurrers, the court directed that judgment be entered for the defendants, and the plaintiff sued out a writ of error, and removed the cause into this court. It being very prop-

erly admitted, by the counsel of the defendants, that the first and second counts of the declaration are in the usual form, it is not necessary to determine the question as to the sufficiency of the third and fourth, and we are the less inclined to do so, from the fact that the counsel on both sides expressed the wish, at the argument, that the decision of the cause might turn upon the question, whether the plaintiff, on the facts disclosed in the pleadings, was entitled to recover against the defendants. That question is the main one presented by the pleadings; and inasmuch as it might well have been tried under the general issue, we think it quite unnecessary to consider any of the incidental questions which do not touch the merits of the controversy. Special pleading in suits on bills of exchange and promissory notes ought not to be encouraged, except in cases where by law the defence would otherwise be excluded or rendered unavailing. Full and clear statements of the facts as disclosed in the pleadings, were presented to the court, at the argument, by the counsel on both sides. They are substantially as follows: In June, 1857, the defendants, residents of Madison, in the State of Indiana, being desirous of procuring a loan of money, made their certain acceptances in writing of two blank bills of exchange, in sets of two parts to each bill, and transmitted the four blanks, thus accepted, to their correspondent, Lot O. Reynolds, then and still residing at Pittsburgh, in the State of Pennsylvania. Both sets of blanks were in the form of printed blanks usually kept by merchants for bills of exchange in double sets, except that each of the four was made payable to the order of the correspondent to whom they were sent, and was duly accepted on its face by the defendants, in the name of their firm. They were in blank as to the names of the drawers and the address of the drawees, and as to date, and amount, and time, and place of payment. When the defendants forwarded the acceptances, they instructed their correspondent to perfect them as bills of exchange, by procuring the signatures of the requisite parties, as accommodation drawers and endorsers, and to fill up each with the appropriate date, and with sums not less than fifteen hundred nor more than three thousand dollars, payable at the longest period practicable, and to sell and negotiate the bills as perfected, for money, and remit the proceeds to the defendants. Afterwards, in the month of July, of the same year, the defendants, at the request of the person to whom those acceptances were sent, made four other similar acceptances, and delivered them to him, to be sold and negotiated as bills of exchange, in double sets, for his own use, and with power to retain

and use the proceeds thereof for his own benefit. They were in all respects the same, in point of form, as the four acceptances first named, and, like those, each of the four parts were made payable to the order of the person at whose request they were given, and was duly accepted by the defendants in the name of their firm. When they delivered the sets last named, they authorized the payee to perfect them as bills of exchange, in two parts, in reasonable amounts, and with reasonable dates. Eight acceptances were thus delivered by the defendants to the same person, corresponding in point of form to four bills of exchange, but with blanks for the names of the drawers and the address of the drawees, and for the respective amounts, dates, and times and places of payment. Four contained, in the printed form of the blanks, the words, "first of exchange, second unpaid;" and the other four contained in the corresponding form the words, "second of exchange, first unpaid;" but in all other respects they were alike. All of the first class were perfected by the correspondent as bills of exchange of the first part, and were sold and negotiated by him at certain other banks in the City of Pittsburgh. He perfected them by procuring L. O. Reynolds & Son to become the drawers, addressed them to the defendants, endorsed them himself in blank, and procured another individual or firm to become the second endorser. They were filled up by him for sums varying from about two thousand to three thousand dollars, with dates corresponding to the times when they were negotiated, and were respectively made payable in four months from date. Contrary to his instructions, he retained the proceeds of the one first negotiated, which he had been directed to remit; and he also retained in his possession, but without inquiry or complaint on the part of the defendants, the other four acceptances, constituting the second class. On the first day of August, 1857, he perfected and filled up as a separate bill of exchange one of the last-named acceptances, and sold and negotiated it to the plaintiff for his own use and benefit. He also perfected and filled up, on the eighteenth day of the same month, another of the same class, in the same manner, and for the same purpose, and on the same day sold and negotiated it to the plaintiff. Both of these last-mentioned bills of exchange vary from those of the first class, not only in dates and amounts, but also as to time and place of payment, and are in all respects single bills of exchange. They were each received and discounted by the plaintiff, without any knowledge whatever that either had been perfected and filled up by the payee without authority, or of the circumstances under

which they had been intrusted to his care, unless the words, "second of exchange, first unpaid," can be held to have that import.

In all other respects, the bills must be viewed precisely as they would be if they had been perfected and filled up by the defendants, and for two reasons, deducible from the decisions of this court:

First. Because, where a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or, in other words, it is the act of the principal, and he is bound by it. *Goodman v. Simonds*, 20 How., 361; *Violet v. Patton*, 5 Cran., 142.

Secondly. Because a *bona fide* holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. *Swift v. Tyson*, 16 Peters, 15; *Goodman v. Simonds*, 20 Howard, 363.

Applying these principles, it is obvious that the only question that arises on this branch of the case is as to the effect of the words, "second of exchange, first unpaid," which appear on the face of the bills. That question, under the circumstances of this case, is a question of law, and not of fact for the jury. Three decisions of this court sustain that proposition; and in view of that fact, we think it unnecessary to do more than refer to those decisions, without further comment in its support. *Andrews v. Pond and al.*, 13 Pet., 5; *Fowler v. Brantly*, 14 Pet., 318; *Goodman v. Simonds*, 20 How., 366.

Another principle, firmly established by this court, and closely allied to the question under consideration, will serve very much to elucidate the present inquiry. In *Dowmes and al. v. Church*, 13 Pet., p. 207, this court held, that either of the set of bills of exchange may be presented for acceptance, and if not accepted, that a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the set being presented; for, say the court, it is by no means necessary

that all the parts should be presented for acceptance before a right of action accrues to the holder.

Now, if either of the set may be presented, and when not accepted a right of action immediately ensues, it is difficult to see any reason why, if upon presentation the bill is accepted, it is not competent for the endorsee to negotiate it in the market; and clearly, if the endorsee may properly negotiate the bill, a *bona fide* holder for value, without notice, may acquire a good title. In this connection, Mr. Chitty says, that "unless the drawee has accepted another part of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others; but if one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may therefore refuse to pay the bearer of the unaccepted part;" from which he deduces the rule, that a drawee of a bill drawn in sets should only accept one of the set. Chitty on Bills, (10 Am. ed., by Barb.,) 155.

Mr. Byles says: "The drawee should accept only one part, for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also;" which could not be, unless it was competent for the holder of a second part to negotiate it in the market. Byles on Bills, p. 310.

Where the drawee accepted and endorsed one part to a creditor, as a security, and afterwards accepted and endorsed another part for value to a third person, but subsequently substituted another security for the part first accepted, it was held, in *Holds-worth v. Hunter*, 10 Barn. and Cress., 449, that, under these circumstances, the holder of the part secondly accepted was entitled to recover on the bill; and Lord Tenterden and Baron Parke held that the acceptor would have been liable on the part secondly accepted, even if the first part had been endorsed and circulated unconditionally.

Judge Story says, in his work on bills of exchange, that the *bona fide* holder of any one of the set, if accepted, may recover the amount from the acceptor, who would not be bound to pay any other of the set which was held by another person, although he might be the first holder. Story on Bills, sec. 226.

No authority is cited, for the defendant, to impair the force of those already referred to; but it is not necessary to express any decided opinion upon the point at the present time. Suffice it to say, that in the absence of any authority to the contrary, we

are strongly inclined to think that the correct rule is stated by Mr. Chitty, and that such is the general understanding among mercantile men.

But another answer may be given to the argument for the defendant, which is entirely conclusive against it; and that is, that the bills described in the first and second counts were not parts of sets of bills of exchange. They were perfected, filled up, and negotiated, by the correspondent of the defendants, to whom the blank acceptances had been intrusted as single bills of exchange; and for the acts of their correspondent, in that behalf, the defendants are responsible to a *bona fide* holder for value, without notice that the acts were performed without authority.

When the transaction is thus viewed, as it must be in contemplation of law, it is clearly brought within the operation of the same rule as it would be if the defendant himself had improvidently accepted two bills for the same debt. In such cases, it is held, that the acceptor is liable to pay both, in the hands of innocent holders for value. *Davidson v. Robertson*, 3 Dow. P. C., 228.

Lord Eldon said, in that case: "Here were two bills for the same account, and supposed to be for the same sums; they who were to pay them had a right to complain that there were two, and yet they were bound to pay both, in the hands of *bona fide* holders, if accepted by them or by others for them, having authority to accept."

To suppose, in this case, that the words "second of exchange, first unpaid," import knowledge to the plaintiff that the bills were drawn in sets, would be to give them an effect contrary to the averments of the defendants' pleas, as well as contrary to the admitted fact that they were not so drawn; and for those reasons the theory cannot be sustained.

In view of all the facts as disclosed in the pleadings, we think the case clearly falls within the operation of the rule, generally applicable in cases of agency, that where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit. *Fitzherbert v. Mathen*, 1 Term., 16, per Buller; *Androscoggin Bank v. Kimball*, 10 Cush., 373; *Montague v. Perkins*, 22 Eng. L. and Eq., 516.

Business men who place their signatures to blanks, suitable for negotiable bills of exchange or promissory notes, and intrust them to their correspondents, to raise money at their discretion, ought to understand the operation and effect of this rule, and not

to expect that courts of justice will fail in such cases to give it due application.

According to the views of this court, the demurrers to the several pleas filed to the first and second counts of the declaration should have been sustained. Having come to that conclusion, it is unnecessary to examine the other propositions submitted on behalf of the defendants.

The judgment of the Circuit Court is therefore reversed, with costs, and the cause remanded, with directions to enter judgment for the plaintiff, as upon demurrer, on the first and second counts of the declaration.

INCOMPLETE INSTRUMENT NOT DELIVERED.

§ 17.

Baxendale v. Bennett (1878), *L. R. 3 Q. B. D. 525*.

Action commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for 50*l.* drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest.

At the trial before LOPES, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill, dated on the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by H. T. Cameron. The plaintiff received the bill from Cameron on the 3d of June, 1872, and was the *bona fide* holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen

from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled upon the authority of *Young v. Grote*, 4 Bing. 253, and *Ingham v. Primrose*, 7 C. B. (N. S.) 82; 28 L. J. (C. P.) 294, that the defendant was liable, and directed judgment to be enacted for the plaintiff for 50*l.* and costs.

Bittleson (*Rolland*, with him), for the defendant.
Jeune, for the plaintiff.

July 2. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill; I am of opinion he could not, but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to shew this? Why is he stopped? What has he said

or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of *Young v. Grote*, 4 Bing. 253, and *Ingham v. Primrose*, 7 C. B. (N. S.) 82; 28 L. J. (C. P.) 294, go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it, with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland v. Evans' Trustees*, 5 H. L. C. 389, shews under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument.

BRETT, L.J. In this case I agree with the conclusion at which by Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the defendant had been guilty of

negligence, and was therefore liable on the bill to the plaintiff.

Bramwell, L.J., says that the defendant is not liable, because if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case it is true that the defendant after writing his name across the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in *Swan v. North British Australasian Company*, 2 H. & C. 175; 32 L. J. (Ex.) 273, there must be the neglect of some duty owing to some person—here how can the defendant be negligent who owes no duty to anybody—against

whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act.

As to the authorities that have been cited; in *Schultz v. Astley*, 4 Bing. N. C. 544, the blank acceptance had been filled up by a stranger and a fraud had been committed; nevertheless, the acceptor was held to be liable. There, however, the acceptance had been issued and it was intended that it should be filled up by someone; but Crompton, J., in *Stoessiger v. South Eastern Ry. Co.*, 3 E. & B. at p. 556, said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham v. Primrose*, 7 C. B. (N. S.) 82; 28 L. J. (C. P.) 294, the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street, they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable because, said the court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing with it is to say we do not agree with it. In *Young v. Grote*, 4 Bing. 253, Young left a blank cheque with his wife and in filling up the cheque for fifty pounds the word fifty was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word fifty, the words "three hundred and" were inserted. Notwithstanding the forgery the court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care, but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland v. Evans' Charity Trustee*, 5 H. L. C. 389, Parke, B., in delivering the opinion of the judges in the House of Lords remarks, with reference to *Young v. Grote*, 4 Bing. 253, "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a

person would not be liable and which govern the present case. "If a man should lose his cheque book or neglect to lock his desk in which it is kept and a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking of *Young v. Grote*, 4 Bing. 253, says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer there must be something that amounts to an estoppel or ratification—"that the plaintiff was estopped from saying that he did not sign the cheque," and then he says the doctrine of ratification is well illustrated by *Coles v. Bank of England*, 10 A. & E. 437. I think the observations made by the Lords in the case of *Bank of Ireland v. Evans' Charity Trustees*, 5 H. L. C. 389, have shaken *Young v. Grote*, 4 Bing. 253, and *Coles v. Bank of England*, 10 A. & E. 437, as authorities. In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, L.J., concurred that the judgment ought to be entered for the defendant.

Judgment for the defendant.

Ledwich v. McKim (1873), 53 N. Y. 307.

Appeal from judgment of the General Term of the Superior Court of the city of New York in favor of plaintiff, entered upon an order denying motion for a new trial and directing judgment on a verdict.

This action was brought to recover back the purchase-money alleged to have been paid to defendants by plaintiff's assignor, William B. Scranton, upon the purchase of certain railroad bonds, upon the ground of failure of title.

On the 16th of October, 1865, William B. Scranton, plaintiff's assignor, bought of defendants ten instruments, purporting to be bonds of the Vicksburg, Shreveport and Texas Railroad Company, each bearing date September 1st, 1857, and professing to bind the company to pay to bearer "the sum of either two

hundred and twenty-five pounds sterling, or one thousand dollars, lawful money of the United States of America, to wit: two hundred and twenty-five pounds sterling, if the principal and interest are payable in London, and one thousand dollars, lawful money of the United States of America, if the principal and interest are payable in New York or New Orleans." To each of the instruments were attached forty interest warrants or coupons for the payment of "nine pounds sterling" each if payable "in London," or forty dollars if payable in "New York or New Orleans," the first of said coupons falling due on the 1st of March, 1858, and one falling due every six months thereafter. In the body of each instrument it is provided that "the president of the company is authorized to fix by his indorsement the place of payment of the principal and interest, in conformity with the tenor of this obligation." Indorsed on each instrument were the words:

"I hereby agree that the within bonds and the interest coupons thereto attached shall be payable in ———.

"C. G. YOUNG, President."

Scranton on the same day on which he purchased the bonds of defendants sold them to Scott, Zerega & Co. It subsequently transpired that the bonds had never been issued by the railroad company; that during the war, viz., in April, 1864, the company's office, at Monroe, Louisiana, had been forcibly entered by United States soldiers, its safe broken open, and the contents, including the bonds in question, carried off. As soon as practicable the company advertised the loss of the bonds, giving notice of the manner of their abstraction, and warning the public that they would not be paid. On learning these facts Scranton, as he testified, called on defendants, tendered them the bonds (which Scott, Zerega & Co. had placed at his disposal), and demanded a return of the consideration money, which tender and demand defendants refused to accept or comply with. Recognizing his liability to refund to Scott, Zerega & Co. the price which they had paid him for the bonds, Scranton assigned to plaintiff his claim against defendants arising out of the facts above mentioned.

Other facts appear in the opinion.

Plaintiff recovered a verdict for the amount paid for the bonds and interest. Exceptions were ordered to be heard at first instance at General Term.

Samuel Hand, for the appellants.

James Clark, for the respondent.

FOLGER, J. The plaintiff puts his right of action upon the ground, that the defendants sold to his assignor these instruments, being personal property, without having any title thereto, and that hence they are liable upon their implied warranty of title. It is not to be disputed that, if these papers are other than negotiable instruments, there was in the sale of them by the defendants an implied warranty of their title to them, and that on a failure of title they are liable. The defendants insist, however, that they only impliedly warrant the genuineness of the execution of the instrument. In this they err. (*Murray v. Judah*, 6 Cow. 484.) The seller warrants the genuineness of the instrument, and that it is what it purports to be. (*Gurney v. Womersley*, 28 Eng. L. & Eq. 256; see *Thrall v. Newell*, 19 Vt. 202.)

It is established by the proofs and verdict, that the instruments were stolen from the railroad corporation, whose obligations they purport to be. It follows that the defendants could acquire no title to them, unless they bring them and bring themselves, within the rules which protect the *bona fide* holder for value of commercial paper. The bonds of a railroad corporation, if they possess the requisites for negotiable paper, fall into that class of instruments, and are to be dealt with and disposed of by an application of the same legal principles. But a negotiable instrument must be a complete and perfect instrument when it is issued, or there must be authority reposed in some one, afterward to supply anything needed to make it perfect. (*The Norwich Bank v. Hyde*, 13 Conn. 279; *Exon v. Russell*, 4 M. & S. 505; *Woodworth v. Bank of America*, 19 J. R., 391.) It is evident upon the face of these papers that they were meant to have a specific place of payment, and that the kind of national money in which they were to be paid and the amount thereof were also to be specific, and that all of this was yet to be specified when they came into and out of the hands of the defendants. Now an exact place of payment, when a place of payment is meant to be fixed, and an exact amount to be paid, are essential parts of a negotiable instrument. (See cases last cited, *supra*.) In *Welch v. Sage* (47 N. Y. 143), cited by the defendants, the bonds were perfect and negotiable without the certificate which had been detached. (See page 148.) These instruments were not perfect when they passed from the possession of the defendants to that of the plaintiff's assignor. It was not then determined where they were to be paid nor in what national money they were to be paid, neither the principal nor the interest. This was uncertain, until by lawful authority, a space left for the purpose, was filled

with the name of the place of payment. The corporation had given power to their president to fill this blank, which power he had not exercised in fact. This was apparent to the defendants and to all others dealing with them. It was plain that the instruments were still imperfect and incomplete, and that they were so when they left the possession of the railroad corporation. It is incumbent then upon the defendants, to show that there is rightful authority elsewhere than in the corporation or its president to fill the blanks and make these bonds perfect instruments. The defendants contend that they or any holder of these instruments, seeing the indorsement of the president in blank, would undoubtedly and justly regard themselves as authorized to fill the blank. Cases are cited to sustain this proposition. In all of them, however, there is an authority from the party to be bound, to him to whom the paper was intrusted, for the filling of the blank, or an actual intrusting of it to him upon some confidence as to its use or disposition. This authority is either express, or it is implied from an actual delivery for future use, of the instrument, though still in its imperfect condition. As to an express authority there can be no question or doubt. The implied authority is found in the fact of delivery for use. For as it is not to be presumed that the delivery for use was meant to be a nugatory and unavailing act, and as it is apparent that it would be, if the instrument may not be perfected before put to use, the law implies an intention and hence an authority, that he to whom it is thus delivered, may supply all needs for making it a perfect and binding negotiable instrument. But this authority is not implied from the fact alone, that the paper is in hands other than those of him who is to be bound, but from the fact joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation. And an express authority, though it be limited, if it be exceeded by the one in whom confidence has been reposed, renders the party to the instrument liable to a *bona fide* holder for value, on the principle that of two, one of whom must suffer by the wrongful act of a third, it should be he who has enabled the wrongful act to be done. But there cannot be an enabling of the wrongful act, unless there be assisting action of the party to the instrument who is sought to be bound, and there must be that in his conduct, in relation to the paper, which shows a parting with the possession of it for use, or with a confidence in him to whom it is delivered.

The liability of the maker of the instrument is put upon his act in sending it into the world in its imperfect form (*Cruchley v.*

Clarance, 2 M. & S., 90), or upon an authority given or confidence reposed in the one put into possession of the instrument, that he should do that with it which should set it afloat on the currents of business. (*Van Duzer v. Howe*, 21 N. Y., 531.) In the last case cited, Denio, J., says, that the principle which lies at the foundation, is that the maker, who by putting his paper in circulation has invited the public to receive it of any one having it in possession with apparent title, is estopped to urge the actual defect of title against a *bona fide* holder. So far has this gone, that it has been held that this authority is revoked by the death of the party sought to be bound, so that one taking paper indorsed by him, and intrusted by him to another for use while yet in an imperfect state, may not recover on it against the estate of the deceased indorser. (*Mich. Ins. Co. v. Leavenworth*, 30 Vt., 11.) And this court has held that when a negotiable instrument is in hands to which, *prima facie*, it has not come in the regular course of business, it is taken by a third party at his peril. (*Central Bank v. Hammett*, 50 N. Y., 158.) No authority has been cited, which decides that the maker of an instrument, negotiable but for some lack susceptible of being supplied, so that it is yet imperfect, who has not by his own act, or by the act of another authorized or confided in by him, put it in circulation, confers a power upon even a *bona fide* holder to supply that lack. He must have been himself instrumental in its leaving his possession and control and passing into that of another, and have been so with the purpose of its becoming effectual for circulation, or with some trust in the person to whom committed, before he can be held liable. He must in some way and for some purpose have created an agency in some one to act with or to hold the paper; and to find an authority in a subsequent holder to make perfect the imperfect paper, this agency must first be established. The remarks of Byles, J., in 2 Hurlst. & Colt., 184, cited and relied upon by the defendants, are qualified by him in *Foster v. MacKinnon* (4 L. R. Com. Pl., 709), where he says, that if they be right, it can only be with reference to a complete instrument. There was no such instrumentality on the part of this railroad corporation. On the contrary, it appears that it had no part in the bonds going out of its possession, but was despoiled of them by superior force.

The defendants claim that there was a failure of the proof to sustain the allegations of the complaint, and that their motion to dismiss the complaint should have been granted. The complaint, they say, substantially averred a cause of action arising from false representations, which is an action *ex delicto*; and that

proof of a breach of an implied warranty of title, being matter of contract, will not sustain a complaint for the cause averred. It is true that the complaint avers that the defendants represented these instruments to be the bonds of the railroad corporation, issued by and binding upon it, and that the plaintiff's assignor relied upon these representations. But the summons is not for relief. It is for money. The complaint avers the facts which were proven and which make out a cause of action in contract. The presence of the averment as to the representations, even were they averred to have been false and fraudulent, do not make the action one *ex delicto*. (See *Conaughty v. Nichols*, 42 N. Y., 83.)

The defendants also moved to dismiss the complaint, on the ground that no damages had been proven to have been sustained by the plaintiff. Whatever other answer might be made to this motion, it did appear that the mortgage, given by the railroad company as a security for the bonds of which these instruments were supposed to be a part, had been foreclosed, and the property covered by it sold and moneys realized thereon. If these instruments had been genuine, the plaintiff or his assignor would have had a right to share in a division of this sum among the bondholders. It would doubtless have been a small dividend which would have been received; but however small, if appreciable, the plaintiff was entitled to it, and entitled to a verdict for that amount. So that a motion to dismiss, for the reason stated, was properly denied. And whatever the damages were, the plaintiff had a right to them, as assignee (see *Bordwell v. Collie*, 45 N. Y., 494), and though he should receive them not for himself, but for others, represented by him, who were the real parties in interest, he being a trustee of an express trust. To the rule of damages, as stated to the jury in the charge of the court, there was no exception taken.

The defendants offered to read in evidence, certain papers which it was claimed would show a submission of this controversy to arbitration, and an award in favor of the defendants. These were not competent to be admitted in bar of the plaintiff's action. The jury have found, upon the question being submitted to them, that the plaintiff's assignor bought the instruments for himself. As it was not claimed that he was a party to the submission, the papers were not competent evidence against him in direct bar of his action. They were not competent as admissions of a party in interest, until it was established that he by whom they were made was such; nor could they until then be received to assist in establishing the fact of his interest. The immediate

issue was, what were the mutual rights of the plaintiff's assignor and of Zarega & Co. at the time of the purchase by the former of these instruments, neither of them being parties on the record in this action. The rule is, that this inquiry lets in such evidence as would have been receivable between those persons. (1 Phil. on Ev., 465, [490], chap. 8, § 10.) The declarations of Zarega would not have been competent in his favor against the plaintiff's assignor, and were not admissible.

But it is claimed that, if not competent in bar of the plaintiff's action, they were admissible on the collateral issue of the credibility of the witness Zarega. He had testified that his house did not buy the bonds from the defendants, but did buy them of Scranton, the plaintiff's assignor. One defence set up in the answer was that the bonds were sold by the defendants to that house, and that afterward, on claim by it, there was a submission to arbitrators and award in the defendants' favor. It was material to this issue, the testimony he had given, and it was on a material point that the defendants now claim that they sought to contradict him. And the papers offered, if shown to have been signed by or with the knowledge of Zarega, or to have come to his knowledge, were pertinent for that purpose; but there was no proof of this.

The defendants' request to charge, it was not error for the court to refuse. There was testimony by Scranton from which the jury could find that he tendered a return to the defendants of the same instruments purchased of them.

The judgment should be affirmed, with costs to the respondent-

All concur.

Judgment affirmed.

SIGNING IN TRADE OR ASSUMED NAME.

§ 20.

Jones v. Home Furnishing Co. (1896), 9 App. Div. Rep. (N. Y.) 103, 41 N. Y. Supp. 71.

Appeal by the defendant, the Home Furnishing Company, from three judgments of the County Court of the County of Kings, entered in the office of the clerk of the County of Kings on the 1st day of April, 1896, upon the decision of the court affirming three judgments rendered by a justice of the peace of the City of Brooklyn.

R. W. Newhall, for the appellant.

John B. Green, for the respondent.

HATCH, J.: Separate actions were brought upon three promissory notes. The notes, which were made payable to the order of "National Publishing Company," and were signed by the defendant through its president, were each in the same form, excepting the dates and amounts. The defendant is a domestic corporation, having its place of business in Brooklyn. The National Publishing Company is a name assumed by plaintiff in carrying on his business, and represents nothing beyond that assumption. It is conceded that the notes were each given for a valuable consideration received by the defendant from the plaintiff, but the claim is made that the notes were made payable to a company that had no existence, and that, therefore, the paper was fictitious; and that as the indorsement was fictitious and spurious no title passed to the notes. This defense savors of delay and the use of legal remedies to prevent collection of a *bona fide* debt. The notes were as much payable to Jones when they were made payable to the name under which he carried on his business as though he had been named therein. It was not in legal contemplation a fiction, but it was the plaintiff under this business name and represented him. When the notes were made and delivered to plaintiff under these conditions they created a liability against the defendant in plaintiff's favor; and had the complaint set out the fact that the payee was the plaintiff's business name, and that the notes were so made payable on account thereof, there would be little doubt that defendant would not have had the temerity to interpose a defense. At the most, the question now here is one of pleading, as plaintiff has made the usual allegation of delivery to the payee and indorsement by it to the plaintiff. But the facts were all known before issue was joined and when the trial was had. The complaint, therefore, will be deemed amended in accordance with the facts. The notes in plaintiff's hands are subsisting liabilities against the defendant in his favor. (*Mechanics' Bank v. Straiton*, 3 Keyes, 365; *Maniort v. Roberts*, 4 E. D. Smith, 83.) These notes having been given for *bona fide* debts, and delivered to the plaintiff, defendant is estopped from setting up as against plaintiff that they were made payable to a fictitious payee, if by such averment the notes would be defeated in plaintiff's hands. (*Irving Nat. Bank v. Alley*, 79 N. Y. 536.)

The judgments appealed from should be affirmed, with costs. All concurred.

Judgments affirmed, with costs.

SIGNATURE BY PROCURATION.

§ 23.

Attwood et al. v. Munnings (1827), 7 B. & C. 278, 4 Eng. Rul. Cas. 364.

Assumpsit by the plaintiffs, as indorsees, against the defendant, as acceptor of a bill of exchange for 1560*l*. Plea, the general issue. At the trial before Lord Tenderden, C. J., at the London sittings after *Michaelmas* term, 1823, a verdict was found for the plaintiffs, subject to the opinion of this court on the following case:

The plaintiffs were bankers carrying on business in the city of London; the defendant was a merchant engaged in extensive mercantile business, and also, in joint speculations to a considerable amount, with Thomas Burleigh, Messrs. Bridges and Elmer, S. Howlett, and W. Rothery. In the year 1815 the defendant went abroad on the partnership business, and remained abroad till after the bill upon which this action was brought became due. By a power of attorney, dated the 18th of May, 1816, the defendant granted power to W. Rothery, T. Burleigh, and S. Munnings, his wife, jointly and severally *for him, and in his name, and to his use*, to sue for and get in monies and goods, to take proceedings, and bring actions, to enforce payment of monies due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions; "indorse, negotiate, and discount, or acquit and discharge the bills of exchange, promissory notes, or other negotiable securities which were or should be payable to him, and should need and require his indorsement;" to sell his ships, execute bills of sale, hire on freight, effect insurances; "buy, sell, barter, exchange, export and import all goods, wares, and merchandises, and to trade in and deal in the same, in such manner as should be deemed most for his interest; and generally for him and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform, and accomplish all and singular such further and other acts, deeds, matters, and things as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and concerns, and as he might or could do if personally acting therein." By another power of attorney, dated the 23d of July, 1817, and executed by the defendant when abroad, he gave to his wife, S. Munnings, power to do a variety of acts affecting his real and personal property; "and also for him and

on his behalf, to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require, &c.; and generally to do, negotiate, and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein." T. Burleigh corresponded with the defendant, and acted as his agent, both before and after the receipt of this power. The defendant, while abroad, employed part of the produce of the joint speculations in his individual concerns, and during his absence, T. Burleigh, for the purpose of raising money to pay creditors of the joint concern, who were become urgent, drew four bills of exchange for 500*l.* each upon the defendant, dated May 22d, 1819. The proceeds of those bills were applied in payment of partnership debts; they were accepted by the defendant by procuration of S. M., his wife. The bill in question was afterwards, in order to raise money to take up those bills, drawn and accepted in the following form:—"Six months after date pay to my order 1560*l.*, for value received: T. Burleigh. Accepted per procuration of G. G. H. Munnings.—S. Munnings." This bill was discounted by the plaintiffs. The defendant returned to England in October, 1821, and he, and each of the partners to the joint speculations, claimed to be a creditor on that concern.

BAYLEY, J. This was an action upon an acceptance importing to be by procuration, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly. By the first of the powers in question the defendant gave to certain persons authority to do certain acts *for him, and in his name, and to his use*. It is rather a power to take than to bind; and, looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it: the first power, therefore, did not warrant this acceptance. The second power gave an express authority to accept bills *for the defendant and on his behalf*. No such power was requisite as to partnership transactions, for the other partners might bind the firm by their accept-

ance. The words, therefore, must be confined to that which is their obvious meaning, viz., an authority to accept in those cases where it was right for him to accept in his individual capacity. Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents; but the drawer of the bill in question was not his agent *quoad hoc*. The bills are to be accepted, too, "as occasion shall require." It would be dangerous to hold that the plaintiff in this case was not bound to enquire into the propriety of accepting. He might easily have done so by calling for the letter of advice; and I think he was bound to do so. For these reasons, I am of opinion that judgment of nonsuit must be entered.

HOLROYD, J. I agree in thinking that the powers in question did not authorize this acceptance. The word *procuration* gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. The case does not state sufficient to show that this bill was drawn by an agent in that capacity, but rather the contrary; for it appears that it was drawn to raise money for the joint concern in which the drawer was a partner; it does not, therefore, come within the special power. Then, as to the general powers. These instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect.

LITLEDALE, J. I am of the same opinion. It is said that third persons are not bound to enquire into the making of a bill; but that is not so where the acceptance appears to be by procuration. The question then turns upon the authority given. The first power of attorney contains an authority to indorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to any thing as to which limited powers are given. The second power gives authority "to accept for me and in my name, bills drawn or charged on me by my agents or correspondents, as occasion shall require." The latter words, as to the occasion, do not appear to me to vary the question; and, reading the sentence without them, it authorizes the acceptance of bills drawn by an agent. The present bill was not drawn by Burleigh in his character as agent, and therefore the acceptance was without sufficient authority, and the plaintiff cannot recover upon it.

Postea to the defendant.

EFFECT OF INDORSEMENT BY INFANT.

§ 24.

In re Soltykoff (1891), 1 Q. B. Div. 413.

Appeal against the dismissal of a bankruptcy petition presented against Prince Alexis Soltykoff.

The petitioner was the indorsee for some bills of exchange which had been accepted by the Prince when he was an infant. There was evidence that the bills had been given in payment for goods supplied to the Prince by the drawer. It was assumed for the purpose of the argument that the goods were necessities.

The registrar held that an infant could not make himself liable for accepting a bill of exchange, even though he accepted the bill in order to pay for necessities supplied to him by the drawer.

The petitioner appealed.

Bigham, Q. C., and *Henry Kisch*, for the appellant.

Finlay, Q. C., and *Herbert Reed*, for the respondent, were not called upon.

LORD ESHER, M. R. The claim of the petitioning creditor is founded upon a debt alleged to be due to him as the indorsee of some bills of exchange accepted by the respondent, who at the time of the acceptance was an infant. The petitioner is not a person who supplied necessities to the respondent when he was an infant. He supplied no necessities to the infant; he is only the indorsee of some bills of exchange accepted by him. As regards an indorsee of a bill of exchange it is immaterial whether there was any consideration for the bills as between the drawer and the acceptor; he can sue the acceptor as the indorsee of the bills, and nothing else. The question, therefore, whether necessities were supplied to the infant by the drawer of the bill, is immaterial.

It has been held in a long series of cases that an infant cannot make himself liable by the custom of merchants either by a bill of exchange or by a promissory note. It is said that those decisions are not binding on this Court. That may be so. But, in my opinion, it would be absolutely wrong at the present day to overrule those cases, which have been so long accepted as law. But I do not wish to rest my decision solely upon case law. The principle long established by English law is this—that an infant cannot make himself liable upon any contract whatever, except a contract for a supply of necessities. I will go further and say this,

that the principle of the cases goes to this extent, that, if an infant accepted a bill of exchange or gave a promissory note for the price of necessities supplied to him, and he were sued upon the bill or the note by the man who had supplied the necessities, and the plaintiff relied only on the bill or note, and gave no evidence of the supply of necessities, the infant would not be liable. He is not liable upon a bill of exchange or a promissory note under any circumstances. It is not necessary for the protection of persons dealing with an infant that he should be liable on such a contract. The person who has supplied an infant with necessities can always sue on that contract for the price of what he has supplied. Whether such a debt would support a bankruptcy petition I will not decide at present. The cases cited are against the appellant, and so is the established principle of English law. I think the Infants' Relief Act is also against him; it seems to me to assume that an infant is not liable upon a bill of exchange or a promissory note. I think this is a necessary implication from that Act, and also from the Bills of Exchange Act. In my opinion, the decision of the registrar was quite right.

BOWEN, L. J. I am entirely of the same opinion. The petition is founded on the contract created by the bills; not on the original contract for the supply of goods, even if that were a contract for the supply of necessities. The Infants' Relief Act is clear that an infant cannot be made liable on such a contract, and the Bills of Exchange Act assumes the same thing.

LOPES, L. J. The petitioner is suing by virtue of the custom of merchants as indorsee of some bills of exchange. The question whether necessities were supplied to the infant does not arise. But, even if the proceedings were between the original parties to the bills, the answer to the claim would be, that an infant cannot render himself liable upon a bill of exchange or a promissory note. This is no hardship upon a person who supplies necessities to an infant, for he is entitled to sue the infant upon the original contract. All the authorities are in favour of this view of the law, and both the Infants' Relief Act and the Bills of Exchange Act point in the same direction.

Appeal dismissed.

FORGED SIGNATURES.

§ 25.

Beattie v. National Bank (1898), 174 Ill. 571, 66 Am. St. Rep. 318.

There is no controversy as to the facts. The case was tried upon a stipulation as to the facts, which were substantially as follows: On September 15, 1891, one George P. Bent of No. 223 Canal Street, Chicago, sent for collection to the First National Bank of Council Bluffs, Iowa, a note for \$133.50, made by a man by the name of Max Bournicus. On September 28, 1891, the First National Bank of Council Bluffs collected the note, and on the same day made its draft for \$133.25 on the National Bank of Chicago, Illinois, to the order of George A. Bent, Chicago. The draft was made payable to the order of George A. Bent, instead of George P. Bent, by mistake. It was mailed to George A. Bent, Chicago, Illinois. George P. Bent was intended to be made the payee in the draft; George A. Bent never had any business transactions with appellee, the drawee, or with the First National Bank of Council Bluffs, the drawer of the draft. The latter bank was never indebted to George A. Bent. A man, named George A. Bent, received the draft from the postoffice, and endorsed upon it his own name, George A. Bent, and sold it to the appellant. The facts tend to show, that the appellant purchased the draft in good faith, relying upon one Beach, a broker, whom he knew, although he was not acquainted with George A. Bent, the supposed payee in the draft. After purchasing the draft the appellant deposited it for his own account in the Bank of Commerce in Chicago, which cleared through the Union National Bank of Chicago. The draft was paid by the appellee bank through the Union National Bank. The appellee returned the draft to the National Bank of Council Bluffs, and it was there discovered that George A. Bent had received the draft intended for George P. Bent. Affidavits, setting up the facts and the mistake which had occurred, were made and attached to the draft; and the draft, with the affidavits so attached, was returned to the appellee. The appellee returned the draft to the Union National Bank, which redeemed it under the rules of the clearing house. The Union National Bank presented it to the Bank of Commerce, and the latter bank took it up, and required the appellant to make the same good. The appellant took the draft to the appellee bank, and, ascertaining that the appellee had funds in its hands belonging to the First National Bank of Council Bluffs, the drawer of the draft, demanded payment; but payment was refused by appellee

on the alleged ground that the endorsement of the payee was a forgery.

Six propositions were submitted by the appellant, the plaintiff below, to the trial court to be held as law in the decision of the case. Two of these were marked held, two were marked refused, and two were modified. The trial court, of its own motion, made in writing and held affirmatively a proposition, holding that no right of action existed against the appellee, the National Bank of Illinois, and declined to hold whether or not the First National Bank of Council Bluffs was liable. Proper exceptions were taken to the action of the court.

Harry Vincent, for appellant.

Arnold Heap, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The question, presented by this record, is within a very narrow compass. It is, whether a party, holding a draft under a forged endorsement of the payee therein, or what amounts to a forged instrument, can compel the drawee to pay him the draft.

It is established clearly by the evidence, that the George A. Bent, who took the draft from the postoffice and endorsed his name upon the back of it, was not the real payee, to whom the drawer of the draft intended to make it payable. It is true, that the real and intended payee and real owner of the draft was named George P. Bent; but the fact, that the name of the real owner and the name of the fraudulent possessor of the draft differ, so far as the middle letter of the name is concerned, does not make the case other than a case, where the name of the real payee and the name of the assumed payee are the same. This is so, because the law does not regard the middle initial letter as a part of a person's name, but only recognizes one Christian name of a party. (*Thompson v. Lee*, 21 Ill. 241; *Erskine v. Davis*, 25 id. 251; *Miller v. People*, 39 id. 457; *Bletch v. Johnson*, 40 id. 116; *Humphrey v. Phillips*, 57 id. 132).

Where a bill is payable to the order of a person, and another person of the name of the payee gets hold of it, and endorses it to a party who takes it in good faith and for value, such party acquires no title to the bill. *Cochran v. Atchison*, 27 Kan. 728. If the endorsement so made by a person who is not the real payee, but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud, his endorsement cannot be regarded otherwise than as a forgery.

In *Barfield v. State*, 29 Ga. 127, it was held that, where there were two persons of the same name, and one of them signed that name to certain notes with the intention that the notes might be used in trade as the notes of the other, it was a forgery.

Blackstone (4 Com. 247) defines forgery to be the fraudulent making or alteration of a writing to the prejudice of another man's right. "One may be guilty of forgery if he fraudulently signs his name, although it is identical with that of the person who should have signed. Thus, if a bill of exchange is payable to A B, or order, and it comes to the hand of a person named A B who is not the payee, and who fraudulently endorses it for the purpose of obtaining the money, this is a forgery." (*United States v. Long*, 30 Fed. Rep. 678.) Where an endorsement is made for the purpose of being fraudulently used as the endorsement of another person, it is falsely made. The falsity of the act consists in the intent that the endorsement shall pass and be received as that of some other party, and in such case, the charge of forgery can be maintained, although the signature is of a name, which might lawfully be used by the person, who put it on the draft or bill of exchange. *Commonwealth v. Foster*, 114 Mass. 311.

In *People v. Peacock*, 6 Cow. 73, where certain coal was consigned to George Peacock of New York, and arrived there, and was claimed by another of the same name, who resided in the same city, but was not the true consignee; and he, knowing this, obtained an advance of money on endorsing the permit for the delivery of the coal with his own proper name, it was held that this was forgery.

Nothing is better settled than that a forged endorsement does not pass title to commercial paper negotiable only by endorsement, and does not justify the payment of such paper. Here, whether the endorsement of the payee's name was technically a forgery, or was merely a spurious and false endorsement, in either case it was inoperative to change the title to the instrument. (*Graves v. American Exchange Bank*, 17 N. Y. 205.) In *Graves v. American Exchange Bank*, *supra*, it was held that the drawee of a bill of exchange is bound to ascertain that the person to whom he makes payment is the genuine payee, or is authorized by him to receive it; that it is no defense against such a payee, that the drawee, in the regular course of business with nothing to excite suspicion, paid the bill to a holder in good faith and for value under an endorsement of a person bearing the same name

as the payee. There it was said by the court: "The defendants, on whom the draft was drawn, paid it upon the endorsement of another Charles F. Graves, residing at or near LaSalle, who wrongfully took it from the postoffice at Mendota. Such a payment, although made in good faith, did not divest or impair the title of the true owner, who had not seen or endorsed the paper."

In *Mead v. Young*, 4 Term Rep. 28, the action was brought by the endorser of a bill of exchange against the acceptor, the bill having been drawn by one Christian on the defendant in London, payable to Henry Davis or order; and, having been put into the foreign mail enclosed in a letter from Christian, it got into the hands of another Henry Davis than the one in whose favor it was drawn; the defendant accepted the bill, and it was discounted by the plaintiff; it was held, that it was competent for the defendant to prove that the person, who endorsed to the plaintiff, was not the real payee, though he was of the same name, and though there was no addition to the name of the payee on the bill; and it was also held that, if a bill of exchange payable to A or order got into the hands of another person of the same name with the payee, and such person, knowing that he was not the real person in whose favor it was drawn, endorsed it, he was guilty of a forgery. In that case, Ashhurst, J., said: "In order to derive a legal title to a bill of exchange it is necessary to prove the handwriting of the payee, and, therefore, though the bill may come by mistake into the hands of another person though of the same name with the payee, yet his endorsement will not confer a title." In the same case, Bullard, J., said: "I am of opinion that it is incumbent on the plaintiff, who sues on a bill of exchange, to prove the endorsement of a person to whom it is really payable. * * * Now here it is clear, that the endorsement was not made by the same H. Davis to whom the bill was made payable; and no endorsement by any other person will give any title whatever."

In the case at bar, when the appellant presented the draft for payment to the appellee, the latter had a right to know that the appellant held the draft under a genuine endorsement. When the appellant presented the draft for payment, it had been ascertained that the endorsement was forged, or at all events spurious and false, and was therefore void. No title passed by it, and if the appellee had made payment to the appellant, appellee could have been compelled again to pay the draft to the true owner thereof. Daniel, in his work on Negotiable Instruments, says: "The maker of a note or the acceptor of a bill must satisfy him-

self, when it is presented for payment, that the owner traces his title through genuine endorsements; for if there is a forged endorsement, it is a nullity, and no right passes by it. And payment to a holder under a forged endorsement would be invalid as against the true owner, who might require it to be paid again. * * * The payor should also satisfy himself of the identity of the holder; for he cannot defend himself against the real payee by showing, that he paid the amount of the bill or note to another person of the same name in good faith and in the usual course of business." (2 Daniel on Neg. Inst., 4th ed., sec. 1225.) So, also, Randolph, in his work on Commercial Paper, says: "Where a bank holds a note or bill for collection under a forged endorsement and collects and pays it over to its principal, it will still be liable to the real owner for the amount collected. * * * So, if a bill is endorsed by another person in the payee's name and paid to the holder under such endorsement, the payee may recover such payment." (3 Randolph on Com. Paper, sec. 1469.)

It follows from the authorities thus referred to, that the appellant, having no title to the draft, was not entitled to recover the amount thereof from the appellee.

If, without knowledge of the real character of the endorsement of the draft by the supposed payee named therein, the appellee had paid the amount of the draft to the appellant, it could have recovered such amount back from the appellant. This results from the fact that "the endorser contracts that the bill or note is in every respect genuine, and neither forged, fictitious nor altered." (1 Daniel on Neg. Inst., 4th ed., sec. 672.) Tiedeman, in his work on Commercial Paper, says: "Inasmuch as the endorser also warrants that he has a perfect title to the paper by endorsement, and is liable if his title proves defective, and since no title passes on a forged endorsement, it follows as a necessary consequence that the endorser must warrant the genuineness of the prior endorsements." (Sec. 259.) Randolph, in his work on Commercial Paper, says: "Since the endorser warrants the genuineness of prior endorsements, payment, made by the drawee to an endorser holding under a forged endorsement, may be recovered from such holder." (Sec. 1469.) It was held in *Chambers v. Union Nat. Bank*, 78 Pa. St. 205, that the holder of a draft, which is endorsed and passed by him, guarantees the prior endorsements. In *Cochran v. Atchison*, *supra*, where a bill was payable to W. W. Owens and one W. W. Owen obtained possession of it and wrongfully endorsed it, it was held that a subsequent endorser could not relieve himself from liability

to his immediate endorsee on the ground that the latter was guilty of negligence in taking the paper without the name of the actual payee endorsed thereon, upon the grounds that the endorser guarantees the genuineness of the signature of the payee, and that the difference in pronunciation between Owens and Owen was so slight as not to amount to a variance. The court held generally in that case, that an endorser warrants the genuineness of endorsements on a bill of exchange. If, therefore, it be true that, upon payment of the amount of the draft to appellant by appellee, a recovery could be had by appellee from the appellant of the amount so paid, upon the ground that appellant by his endorsement had guaranteed the genuineness of the previous endorsement by George A. Bent, it would be useless to hold that a right of recovery exists in favor of the appellant against the appellee. To require the appellee to pay an amount, which it could hereafter recover back again, would be an idle ceremony.

Counsel for appellant claims, that he has a right of action for negligence against the First National Bank of Council Bluffs, Iowa, because of the alleged carelessness of that bank, which was the drawer of the draft, in not mailing it properly to the payee named therein. In other words, it is said that, instead of addressing the letter enclosing the draft to George A. Bent of Chicago, it should have addressed it to George P. Bent of 223 South Canal Street, Chicago. We do not deem it necessary to decide, whether or not an action will lie in favor of the appellant against the Iowa bank. This action is against the appellee bank, and it is sufficient to say that, so far as this record shows, the appellee was guilty of no negligence.

The judgment of the Appellate Court, affirming the judgment of the Circuit Court, is affirmed.

Judgment affirmed.

Robertson v. Coleman et al. (1886), 141 Mass. 231.

Contract to recover the amount of a bank check for \$91.08, signed by the defendants, dated March 31, 1883, and payable to the order of Charles Barney. Trial in the Superior Court, before Knowlton, J., who reported the case for the determination of this court, in substance as follows:

On March 27, 1883, a young man went to the Metropolitan hotel in Boston, of which the plaintiff was the proprietor, and registered his name as Charles Barney. On that or the next day

he took to the place of business of the defendants, who sold property as auctioneers, a team, of which he represented himself to be the owner, and which he desired them to sell on his account. He gave his name there as Charles Barney. In reply to an inquiry regarding him, they received a message by telegraph that Charles Barney, of Swanzey, was a responsible and trustworthy man. Believing him to be Charles Barney, of Swanzey, they sold the horse and carriage for him, and three days afterwards gave him, in payment of the money received, the check declared on. On March 31, he left the plaintiff's hotel, where he had been staying in the mean time under the name of Charles Barney, and, before going, he gave the check to the plaintiff in payment of his board bill of \$16.75, and received the balance of its amount in cash from the plaintiff. At the same time he indorsed it in blank with the name of Charles Barney. It turned out that Charles Barney was not his true name, and there was no evidence that he had ever gone by that name before registering at the plaintiff's hotel. The defendants discovered that he had stolen the team which he left with them, and, by their order, the bank upon which the check was drawn refused to pay it. It was in evidence that there was a person in existence by the name of Charles Barney, of Swanzey. It appeared that the plaintiff made no further inquiry as to the identity of the payee than for information which was founded upon the representations of his said lodger.

Upon these facts, the judge instructed the jury as follows: "If the person who took the team to the defendants' place of business left it there under the name of Charles Barney, and the defendants, in receiving it, dealt with him as Charles Barney, and sold the team for him, and three days afterwards gave him the check in the belief that he was Charles Barney, of Swanzey, and was the owner of the team, and said person had in the mean time been boarding at the plaintiff's hotel under that name, and had gone by that name while at said hotel, the plaintiff, upon the receipt from him of said check in good faith, for a valuable consideration, with his indorsement upon it, acquired a good title to it as against the defendants."

The jury returned a verdict for the plaintiff. If the instruction was correct, judgment was to be entered upon the verdict; otherwise, such order to be made as law and justice might require.

S. J. Thomas & C. P. Sampson, for the defendants.
C. F. Kittredge, for the plaintiff.

FIELD, J. The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name. The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, and whose name they believed to be Charles Barney, and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check. The plaintiff received this check for a valuable consideration, in good faith, from the same person, whom he believed to be Charles Barney, and who indorsed the check by that name. It appears that the defendants thought the person to whom they gave the check was Charles Barney, of Swanzey, a person in existence, but it does not appear that they thought so from any representations made by the person to whom they gave the check, although this, perhaps, is immaterial. It is clear from these facts, that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations, the plaintiff took it in good faith and for value. (See *Samuel v. Cheney*, 135 Mass. 278; *Edmunds v. Merchants' Transportation Co.*, 135 Mass. 283.)

Judgment on the verdict.

BILLS IN A SET.

§§ 180—185.

Walsh v. Blatchley (1853), 6 Wis. 413.

Appeal from Marquette Circuit Court.

The plaintiff declared in trespass on the case upon promises, for money lent; money laid out and expended; money paid and received by the defendants for the use of the plaintiff, &c.; also gave notice of the cause of action, the indorsement by defendants upon the bill of exchange, copied, and served with the declaration, as follows:

"Express Exchange Office,
"Adams & Co. "Downieville, San Francisco.
"Exchange for \$250. Oct. 6, 1854.
"No. 9,917."

"At sight of this 2d of exchange—first and third unpaid—
"pay to the order of Phoebe Blatchley, two hundred and fifty
"dollars value received, and place to account of exchange.
"ADAMS & Co.

"To Messrs. Adams & Co., New York,
(Countersigned,)
"S. W. Langworthy, C. B. Macy, Agents."

Indorsed by Phoebe Blatchley to Henry Dart or order, and
by J. Henry Dart to P. O. Strang or order, and by Strang to P.
Walsh or order.

The defendants plead the general issue; and by mutual agree-
ment of counsel, the cause was tried before the circuit judge,
without the intervention of a jury, who found, and reported in
writing with his decision, the facts and conclusions, and recited
in full in the opinion of the court therein.

Orton, Hopkins and Firman, for appellant.
Smith and Keyes, for respondent.

By the Court, COLE, J. This case was tried by the court
without the intervention of a jury, and the judge found the
following facts:

First. That the action is brought upon the bill of exchange
introduced in evidence, and described in the plaintiff's declara-
tion. That this bill, which is the second of the set, was indorsed
by the defendants on a Sunday.

Second. That the first of the set was sold by defendants to
plaintiff about the 1st of January, 1855. That the plaintiff with-
out delay, sent the same by mail to his correspondent in New
York city, the residence of the drawee, for presentation and pay-
ment. That by some delay in the mail the letter did not reach
New York until the 9th of April following, at which time, the
letter with inclosure, was duly received by the said correspondent.
That the bill was not presented for payment.

Third. That in the last of March, the plaintiff, fearing the

said first bill was lost, procured the defendants to indorse and deliver to him the second of the set, and had it presented on the third day of April following for payment, to the drawee, and payment was refused. The bill was duly protested, and proper notice given to the defendants who were indorsers.

The conclusions of law which the court drew from these facts, were, "1st. That the liability in this action, if any at all, is upon the second bill of the set, and not on the first; 2d. That because the said bill was indorsed on Sunday, that therefore such indorsement was absolutely void."

We have examined with considerable care the authorities, and have not been able to find a case precisely like the present, although it would seem as if the point must have frequently arisen in the courts in this country, and in England. The case of *Perreira v. Jepp et al.*, cited in a note on page 449, 11 B. and C., would seem to have a strong bearing upon the case at bar. It was there held that he to whom any part of the set is *first* transferred, acquires a property in *all* the other parts, and may maintain trover even against a *bona fide* holder, who subsequently, by transfer, or otherwise, gets possession of another part of the set. That is, deciding that the first indorsement of one of the set vests in the indorsee the absolute right to the possession of the whole set. And we suppose it would follow, from this doctrine, that the indorsement of the second in this case was entirely unnecessary. The liability of the indorser arose from indorsing the first of the set for value. We think her liability was not increased one jot or tittle by indorsing the second of the set. Suppose she had indorsed all of them in January, at the time she indorsed the first, is it not obvious that her liability would not have been different from what it is? It is conceded that the indorsement of the first was good, and this indorsement was entirely adequate to carry with it the second and third. (See Edwards on Bills, 304 and 162; *Holdworth v. Hunter*, 10 B. & C. 449; *Kentworthy v. Hopkins*, 1 Johns. Cas. 107.) Either of the set may be presented for acceptance, and, if not accepted, a right of action arises upon due notice, against the indorser. *Downes and Co. v. Church*, 13 Peters, 205. The bill upon which the protest was made was declared on and produced, and it also appeared that the first had not been presented for payment. The court says, and we think properly and correctly, that if the first had been presented for payment and protested, even as late as April 9th, that upon proper notice the indorser would have been held, for the delay in the mail would have been a sufficient excuse for

the apparent neglect in not presenting it for acceptance before. The case might have been relieved from all doubt and difficulty, had the indorsee declared upon the first of the set, and produced on the trial the second, which had been presented for acceptance and dishonored. *Wells v. Whitehead*, 15 Wend. 527. This he did not see fit to do, but we think he was entitled to recover even as the facts appeared before the court.

The judgment is reversed, and a new trial ordered.

SECTION III—DELIVERY.

DELIVERY ESSENTIAL TO COMPLETION OF CONTRACT. § 18.

Burson v. Huntington (1870), 21 Mich. 415, 4 Am. Rep. 497.

Action on the following instrument:

“SCHOOLCRAFT, MICH., Apr. 12th, 1866.

“Ninety days from date, for value received, I promise to pay A. N. Goldwood, or order, one hundred and twelve dollars, and fifty cents, with interest.

JOHN W. BURSON.”

Indorsed on the back,—“A. N. Goldwood.”

It appeared on the trial that Goldwood had come to the house of Burson to finish some negotiations in respect to which the note in suit was to be given; that the note was there written by Goldwood and signed by Burson; that the arrangement was that some other person should sign the note as surety with Burson; that Burson left the room with the avowed purpose of getting his uncle as surety, telling Goldwood as he went out not to touch the note till he came back because the negotiations were not finally settled; that while Burson was out Goldwood took the note and went away with it in spite of the remonstrance of Burson's sister, who was present when Burson said to Goldwood not to take the note; that Goldwood subsequently indorsed the note to Huntington, who sues as a holder in due course; that the note was not stamped when Goldwood took it. Judgment for plaintiff.

The further facts sufficiently appear from the opinion.

CHRISTIANCY, J. (after passing upon questions of evidence and practice) As a general rule, a negotiable promissory note,

like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. See *Edwards on B. & N.*, 175, and authorities cited, and 1 *Pars. on B. and N.*, 48 and 49, and cases cited, and see *Thomas v. Watkins*, 16 Wis. 549; *Mahon v. Sawyer*, 18 Ind. 73; *Carter v. McClintock*, 29 Mo. 464.

Delivery is an essential part of the making or execution of the note, and it takes effect only from delivery (for most purposes); and if this be subsequent to the date, it takes effect from the delivery and not from the date. 1 *Pars.*, *ubi supra*. This is certainly true as between the original parties.

But negotiable paper differs from ordinary written contracts in this respect: that even a wrongful holder, between whom and the maker or indorser the note or indorsement would not be valid, may yet transfer to an innocent party, who takes it in good faith, without notice and for value, a good title as against the maker or indorser. And the question in the present case is, how far this principle will dispense with delivery by the maker.

When a note payable to bearer, which has once become operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker, and all indorsers on the paper when in the hands of the loser; and the loser must sustain the loss. In such a case there was a complete legal instrument; the maker is clearly liable to pay it to some one; and the question is only to whom.

But in the case before us, where the note had never been delivered, and therefore had no legal inception or existence as a note, the question is whether he is liable to pay at all, even to an innocent holder for value.

The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the *theft* or wrongful *seizure* of this paper create a valid contract on the part of the maker *against his will*, where *none existed before*? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note.

But it is urged that this case falls within the general prin-

ciple which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This is a principle of manifest justice when confined within its proper limits. But the principle, as a rule, has many exceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged, can properly be said to have "enabled the third person to occasion the loss," within the meaning of the rule. If I leave my horse in the stable, or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible to steal him from that particular locality. And upon examination it will be found that this rule or maxim is mainly confined to cases where the party who is made to suffer the loss, has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person whose acts or negligence have enabled such third person to occasion the loss; and that the party has been held responsible for the acts of those in whom he had trusted upon ground analogous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions, by which the rights of others may be affected, has, as to the persons to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or *indicia* of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confidence is, as to those who have been deceived into parting with property or incurring obligations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearances.

Hence, to confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery, have no bearing upon the question. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily deliver it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to, or discounted by a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions not apparent upon the face of the paper, and the person to whom it is thus entrusted violate the confidence reposed in him, and put the note into cir-

ulation; this, though not a valid delivery as to the original parties, must, as between a *bona fide* holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder; or if the note be sent by mail, and get into the wrong hands; as the party intended to deliver to some one, and selects his own mode of delivery, he must be responsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect, if the note or indorsement were signed in blank, if the maker or indorser part with the possession, or authorize a clerk or agent to do so, and it is done. *1 Parsons on Bills and Notes, 109 to 114*, and cases cited, especially *Putnam v. Sullivan*, 4 Mass. 45, which was decided expressly upon the ground of the confidence reposed in the third person, as to the filling up, and in the clerks as to the delivery.

And when the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is thus fraudulently obtained from him, he must, doubtless, as between him and an innocent holder for value, bear the consequences of his own credulity and want of caution. He has placed a confidence in another, and by putting the papers into his hands, has enabled him to appear as the owner, and to deceive others. Cases of this kind are numerous, but they have no bearing upon the wrongful taking from the maker, when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud; when it is laid down as a general rule, that it is no defense for a maker, as against a *bona fide* holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not.

We do not assert that the general rule we are discussing—that “where one of two innocent parties must suffer,” etc.—must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation, might justly estop him from setting up non-delivery; as if

he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken.

Upon this principle the case of *Ingham v. Primrose* (7 C. B. (N. S.), 82) was decided, where the acceptor tore the bill into halves (with the intention of canceling it) and threw it into the street, and the drawer picked them up in his presence, and afterwards pasted the two pieces together and put them into circulation. See also by analogy *Foster v. Mackinnon*, Law Rep., 4 Com. B., 704.

But the case before us is one of a very different character. No actual delivery by the maker to any one for any purpose.

The evidence tends to show that when he left the room in his own house, the note being on the table, and his sister remaining there, he did not confide it to the custody of the payee, but told him not to take it, and no final agreement between them had yet been made, and no consideration given. Under such circumstances he can no more be said to have trusted it to the payee's custody or confidence, than that he trusted his spoons or other household goods to his custody or confidence; and there was no more apparent reason to suppose he would take and carry off the one, than the other.

The maker, therefore, cannot be held responsible for any negligence; there was nothing to prove negligence, unless he was bound to suspect, and treat as a knave, a thief or a criminal, the man who came to his house apparently on business, because he afterwards proved himself to be such. This, we think, would be preposterous.

We, therefore, see no ground upon which the defendant could be held liable on a note thus obtained, even to a *bona fide* holder for value. He was guilty of no more negligence than the plaintiff who took the paper, and the plaintiff shows no right or equities superior to those of the defendant.

Such, we think, must be the result upon principle. We have carefully examined the cases, English and American, and are satisfied there is no adjudged case in the English courts, so far as their reports have reached us, which would warrant a recovery in the present case. Some *dicta* may be found, the general language of which might sustain the liability of the maker; such as that of Alderson, Baron, in *Marston v. Allen* (8 M. & W., 494), cited by Duer, J., in *Gould v. Segee*, 5 Duer, 260, and that used by Williams, J., in *Ingham v. Primrose*, 7 C. B. (N. S.), 82. But

a reference to the cases will show that no such question was involved, and that these remarks were wholly outside of the case.

On the other hand, *Hall v. Wilson*, 16 Barb., 548, 555, and 556, contains a *dictum* fully sustaining the views we have taken.

There are, however, two recent American cases, where the note or indorsement was obtained without delivery, under circumstances quite as wrongful as those in the present case, in one of which the maker, and in the other the indorser, was held liable to a *bona fide* holder for value: *Shipley v. Carroll et al.*, 45 Ill., 285 (case of maker) and *Gould v. Segee*, 5 Duer., 266. But in neither of these cases can we discover that the court discussed or considered the real principle involved; and we have been unable to discover anything in the cases cited by the court to warrant the decision. It is possible that the case in Illinois may depend somewhat upon their statute, and the note being made as a mere matter of amusement, and the making not being justified by any legitimate pending business, the maker might perhaps justly be held responsible for a higher degree of diligence, and therefore more justly chargeable with negligence under the particular circumstances, than the maker in the present case.

There is another case (*Worcester Co. Bank v. Dorchester & Milton Bank*, 10 Cush., 488), where bank bills were stolen from the vault of the bank, which though signed and ready for use, had never been yet issued, and on which a *bona fide* holder for value was held entitled to recover. This, we are inclined to think, was correct. The court intimated a doubt whether the same rule should apply to bank bills as to ordinary promissory notes, and as to the latter, failed to make any distinction between the question of delivery and questions affecting the rights of the parties upon notes which have become effectual by delivery. But we think bank bills which circulate universally as cash, passing from hand to hand perhaps a hundred times a day, without such inquiries as are usual in the cases of ordinary promissory notes of individuals, stand upon quite different grounds. And, considering the temptations to burglars and robbers, where large masses of bank bills are known to be kept, and the much greater facility of passing them off to innocent parties, without detection or identification of the bills or the parties, and that the special business of banks is dealing in, and holding the custody of, money and bank bills; it is not unreasonable to hold them to a much higher degree of care, and to make them absolutely responsible for their safe keeping. We do not therefore regard this case as having any material bearing upon the case before us.

We think the Circuit Court erred in refusing to charge upon this point, as requested by the defendant below.

We do not think there was any error in refusing to charge that the want of a stamp on the note would be such circumstance of suspicion as to put the indorsee upon inquiry in taking the note. Under our decisions the note would be valid and could be enforced in our courts without a stamp.

Some other minor questions were raised, but we do not think they will be likely to arise upon a new trial.

The judgment must be reversed with costs, and a new trial awarded.

The other justices concurred.

Kinyon v. Wohlford (1871), 17 Minn. 239, 10 Am. Rep. 165.

Action on a promissory note. Judgment on a verdict for the defendant. Appeal by plaintiff from order denying a new trial.

Wheelock & Cogswell, for appellant.

Gordon E. Cole, for respondent.

BERRY, J. This is an action upon a promissory note payable by its terms to C. W. Stevens, or bearer, and signed by defendant.

There was plenary evidence showing that the plaintiff is a *bona fide* holder of the note, having purchased the same before maturity, in good faith, without notice and for value.

The only defense urged here is that there was no *delivery* of the note to any person by or on behalf of the defendant; that for want of *delivery* it is not the *note* of defendant, and he is not liable thereon even to a *bona fide* holder. "A *bona fide* holder for value, without notice, is entitled to recover upon any negotiable instrument which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft, or by robbery." Story on Prom. Notes, § 191; 2 Gr. Ev., § 171; *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 Howard, 365; *Raphael v. Bank of England*, 17 C. B. 162; *Wheeler v. Guild*, 20 Pick. 545; *Magee v. Badger*, 34 N. Y. 249; *Powers v. Ball*, 27 Vt., 662; *Catlin v. Hause*, 1 Duer, 325; *Gould v. Segee*, 5 Duer, 268; *Mars-ton v. Allen*, 8 Mees. & Welsby, 494; Smith's Lead. Cases, 597 *et. seq.*; 1 Ross Lead. Cases 205 *et. seq.*

The fact that there has been no delivery of the instrument by or for the maker, or by or for an indorser through whom the holder must claim, is a defect or infirmity of title within the meaning of the rule above cited, a rule which is said to be laid up among the fundamentals of the law. *Worcester County Bank v. Dorchester & Melton Bank*, 10 Cushing, 488; *Edwards on Bills and Notes*, 188; *Gould v. Segee*, *supra*; *Ingham v. Primrose*, 7 C. B. (N. S.) 82; *Shipley v. Carroll*, 45 Ill. 285; *Clark v. Johnson*, 54 Ill. 296.

The order denying a new trial must be reversed.

PRESUMPTION OF DELIVERY.

§ 18.

Mass. Nat. Bank v. Snow (1905), 187 Mass. 159.

Contract on three promissory notes, each for \$2,432.33, dated December 9, 1899, payable to and indorsed by the defendant and discounted by the plaintiff, as described in the first paragraph of the opinion. Writ dated April 25, 1900.

At the trial in the Superior Court before Harris, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, raising the questions stated by the court.

E. P. Carver & F. H. Smith, Jr., for the plaintiff.

S. L. Whipple & E. M. Brooks, for the defendant.

KNOWLTON, C.J. This is an action of contract on three promissory notes, signed H. G. and H. W. Stevens, payable to the order of the defendant, indorsed by him in blank and discounted by the plaintiff. They severally bear date December 9, 1899, and the rights of the parties are accordingly governed by the St. 1898, c. 533, sometimes called the negotiable instruments act, which is now embodied in R. L. c. 73, §§ 18 to 212, inclusive. In referring to different provisions of this statute it may be convenient to cite the sections of the Revised Laws, rather than those of the original act.

The maker of the notes, H. W. Stevens, who did business under the name of H. G. and H. W. Stevens, has deceased, and the defendant introduced evidence tending to show that, after the defendant had indorsed the notes, they were taken from his possession by the maker, without his knowledge or consent, and

discounted at the plaintiff bank, and that they were altered by the insertion of the words "seven per cent" after the words "with interest." The defence is founded on this evidence. The defendant's counsel stated that he made no contention that the bank had actual knowledge of any infirmity in the instruments, or defect in the title to them, or that it took them in bad faith. Nor was it contended by the defendant that in discounting the notes the bank acted otherwise than in the regular and usual course of business. But upon the defendant's testimony it might be found that the notes were given to him by the maker in payment of indebtedness, that after he had indorsed them in blank and put them in his desk for collection or discount he was called out of his office, leaving the maker Stevens there, and that Stevens then took them without right, and three days later carried them to the plaintiff bank and caused them to be discounted for his own benefit. The plaintiff made many requests for rulings, which were refused subject to its exception, among which were the following:

"First. That on all the evidence judgment should be for the plaintiff for the full amount declared upon in its declaration, with interest at seven per cent from December 9, 1899."

"Fourth. That if the plaintiff shows it took the notes declared upon in its declaration as a holder in due course, judgment should be entered for the plaintiff for the full amount of said notes with interest at the rate stated in the same from December 9, 1899."

"Fifth. That when an instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

"Eighth. That the notes declared upon by the plaintiff in its declaration are complete and regular, and were taken before they were due, and for value."

"Ninth. That a holder of a note is deemed *prima facie* to be a holder in due course and that to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

"Fifteenth. That there is no evidence in the case to warrant a jury in finding that the plaintiff was possessed of facts which put it upon its guard as to the title of the person delivering the notes declared upon or which ought to have led the plaintiff to inquiry concerning the same."

"Nineteenth. That when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

"Twenty-third. That even if the jury should find that the words 'seven per cent' were added to the face of said notes after they were indorsed by the defendant, and without his authorization or ratification, yet, on all the evidence in the case, the verdict must be for the plaintiff for the full amount of said notes, with interest at six per cent from December 9, 1899."

The plaintiff also excepted to the following instructions, given at the request of the defendant:

"Fourth. If the jury find that the notes were taken from the defendant wrongfully and that the same were never delivered by the defendant to Stevens, the plaintiff gained no title to the notes by the negotiation of the same by Stevens, and the plaintiff cannot recover.

"Fifth. The burden is upon the plaintiff to show that the notes were delivered by the defendant to Stevens or some other person authorized to negotiate them at the plaintiff bank."

"Seventh. Or in the alternative, if the jury find that the notes in question were altered by the addition of the words 'seven per cent' thereto after the same were indorsed by the defendant, such an alteration is a material and wrongful one, destroying the validity of the notes, and upon the notes or any one of them thus altered the plaintiff cannot recover."

The notes, being indorsed in blank, were payable to bearer within the meaning of the statute. R. L. c. 73, § 26, cl. 5. When the notes were taken to the plaintiff for discount Stevens was the bearer. R. L. c. 73, § 207. The presentation of such notes for discount raised a presumption of fact that the bearer was the owner of them. *Pette v. Prout*, 3 Gray, 502. Upon the undisputed evidence and upon the defendant's admission that the plaintiff took them in good faith and discounted them without knowledge of any infirmity in them or defect of title in Stevens, the plaintiff became a holder in due course, within the definition of the statute. R. L. c. 73, §§ 69, 76. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140. There was not even anything to put the plaintiff upon inquiry, for the rate of interest was the same that Stevens had been paying on his loans from the bank for two years. The uncontradicted evidence, as well as the defendant's admission, makes it plain that the plaintiff had no notice of any infirmity in the instruments or defect in the title of Stevens, under

the rule prescribed by the statute. R. L. c. 73, § 73. This rule, namely, that to constitute such notice the person to whom the note is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, is the same as prevailed in this Commonwealth before the enactment of the statute. *Smith v. Livingston*, 111 Mass. 342; *Lee v. Whitney*, 149 Mass. 447; *International Trust Co. v. Wilson*, 161 Mass. 80, 90.

The defendant's contention that after the notes had been delivered to the defendant and endorsed by him they were stolen by Stevens, brings us to the question whether, under the negotiable instruments act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. *Wheeler v. Guild*, 20 Pick. 545, 550, 553; *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488; *Wyer v. Dorchester & Milton Bank*, 11 Cush. 51, 53; *Spooner v. Holmes*, 102 Mass. 503; *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, and cases cited. *Smith v. Union Bank of London*, 1 Q. B. D. 31; *Goodman v. Simonds*, 20 How. 343, 365; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. National Shoe & Leather Bank*, 21 Wall. 354; *Kinyon v. Wohlford*, 17 Minn. 239; *Clarke v. Johnson*, 54 Ill. 296; *Seybel v. National Currency Bank*, 54 N. Y. 288; *Evertson v. National Bank of Newport*, 66 N. Y. 14; *Kuhns v. Gettysburg National Bank*, 68 Penn. St. 445.

The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course. "But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." R. L. c. 73, § 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note payable to bearer, it is a wholesome and salutary provision. See *Greeser v. Sugarman*, 76 N. Y. Supp. 922. Upon the defendant's statement and the counsel's theory of the case, the rule is applicable. The note not only was complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by

him. Therefore the first sentence of the R. L. c. 73, § 33, "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," was inapplicable. The instrument had taken effect, and subsequently was negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to become payable to bearer.

Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise.

We are of opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute.

There also was error in the instructions given as to the alleged alteration of the notes. By the R. L. c. 73, § 141, it is provided that "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This language is directly applicable to the present case. See *Scholfield v. Earl of Londesborough*, [1894] 2. Q. B. 660; [1895] 1 Q. B. 536; [1896] A. C. 514; *Schwartz v. Wilner*, 90 Md. 136, 143.

We understand that the instructions were given independently of any question of pleading, and we therefore do not deem it necessary to determine, at this stage of the case, whether the plaintiff should amend its declaration by inserting counts upon the notes as they were before the alleged alteration, if it wishes to recover upon them as notes bearing interest at only six per cent. See *Mutual Loan Association v. Lesser*, 78 N. Y. Supp. 629. Nor do we consider other questions which are not likely to arise upon a second trial.

Exceptions sustained.

SECTION IV—CONSIDERATION.

PRESUMPTION OF CONSIDERATION.

§ 26.

Averett's Adm'r v. Booker (1859), 15 Gratt. 163, 76 Am. Dec. 203.

This was an action of *assumpsit* in the Circuit Court of the city of Lynchburg, brought by William T. Booker against William B. Averett's administrator. The plaintiff declared upon the following paper, which he averred was made for value received.

\$1,080.59

LYNCHBURG, December 8, 1852.

The trustee of Norvell and Averett will pay to William T. Booker the sum of one thousand and eighty dollars and fifty-nine cents, with interest from 1st of March, 1850, out of any moneys in his hands belonging to me.

WM. B. AVERETT.

On the trial of the cause, the plaintiff introduced in evidence the foregoing paper, and also proved that it was presented and not paid; and that there were no effects out of which the order could, at the time of the trial, be paid. And this being all the evidence in the cause, the court, at the instance of the plaintiff, instructed the jury that they might infer from the paper aforesaid, a consideration moving from the plaintiff to the defendant's intestate, which entitled him, without further evidence than the paper itself, to recover in this case.

To this opinion of the court the defendant excepted: And there having been a verdict and judgment against him, he applied to a judge of this court for a *supersedeas*; which was allowed.

Green, for the appellant.

Garland, for the appellee.

LEE, J. The only question in this case is that raised by the instruction asked for by the defendant in error upon the trial. The declaration unlike that in *Jackson v. Jackson*, 10 Leigh 448, sufficiently avers a consideration for the draft or order which it describes, but as when it was produced at the trial no consideration was expressed upon its face and it was not stated to have been made "for value received," the question made was whether the jury could from the paper alone infer such a consideration moving from the defendant in error to the plaintiff's intestate as would entitle him to recover without further evidence.

If the order in question were good as a bill of exchange it cannot be questioned that the party might have recovered upon it without averring in his declaration or proving at the trial that any value had been received for it, as such a bill is presumed to stand on valuable consideration and *prima facie* to import it. (Bayly on Bills, ch. 1, § 13, p. 40; *Macleed v. Snee*, 2 Str. R. 762; *Poplewell v. Wilson*, 1 Id. 264; *Philliskirk v. Blackwell*, 2 Maule & Sel. 395; *Wilson v. Codman's ex'or*, 3 Cranch's R. 193, 207; *Hatch v. Traves*, 11 Adolph & El. 702; 39 Eng. C. L. R. 207; *Jones v. Jones*, 6 Mees. & Welsb. 84; Bayly on Bills, ch. 9, p. 390; *Coombe v. Ingram*, 4 Dowl. & Ryl. 211.) But I think it clear that this paper cannot be regarded as a bill of exchange, nor as carrying with it the exemption pertaining to that class of securities from the necessity of both averring and proving a sufficient consideration as the condition of recovering upon it. To constitute a good bill of exchange, the sum to be paid must not only be in money and certain in amount, but it must be payable absolutely and at all events. If it be payable out of a particular fund or upon an event which is contingent, or if it be otherwise conditional, it is not in contemplation of law a bill of exchange. (*Roberts v. Peake*, 1 Burr. R. 323; *Carlos v. Fancourt*, 5 T. R. 482; Chitty on Bills, ch. 5, p. 152, *et seq.*; Bayly on Bills, ch. 1, § 6, p. 16, *et seq.*; Story on Bills, § 46; *Crawford v. Bully*, Wright's R. 453; *Van Vacter v. Flack*, 1 Smedes & Marsh. R. 393; *Hamilton v. Myrick*, 3 Pike's R. 541.) Here the sum to be paid is not payable absolutely and at all events. It is payable out of a particular fund, to wit, the moneys, if any, in the hands of the drawee belonging to the drawer. The draft therefore cannot be treated as a bill of exchange, nor can a recovery be had upon it as such.

So, again, if the paper in question contained an express promise to pay the sum mentioned upon which an action of debt might be maintained under our statute, I incline to think that the recovery might be had without further proof of consideration. If debt would lie upon the paper, it would be evidence of such indebtedness as would be a sufficient consideration for the purpose to pay in the action of *assumpsit*. The case of *Jackson v. Jackson*, above cited, so far as it is of any authority, having been decided by a court equally divided, shows that it is not necessary in such a case even to aver a consideration. For the declaration without averring such consideration was sustained by the court below, and that judgment was affirmed by the division of this court. But it is unnecessary to go into this question in this case,

because whilst the declaration in all its counts sufficiently avers a consideration, it is not pretended that the paper offered in evidence contained any thing that could by any construction be held to be an express promise to pay the sum of money mentioned in it. And not being a bill of exchange, no promise is raised by law in favor of the payee against the drawer from the failure of the drawee to accept or to pay. (*Josceline v. Lasserre*, Fortesc. R. 281; S. C. 10 Mod. R. 294, 316; *Jenny v. Herle*, 1 Stra. R. 591; S. C. 2 Ld. Raym. R. 1361; *Haydock v. Lynch*, 2 Ld. Raym. R. 1563; *Banbury v. Lisset*, 2 Stra. R. 1211; *Dawkes v. DeLorane*, 3 Wils. R. 207; S. C. 2 Wm. Black. R. 782; *Nichols' adm'r v. Davis*, 1 Bibb's R. 490; *Mershon v. Withers*, Id. 503; *Carlisle v. Dubree*, 3 J. J. Marsh. R. 542.)

The case of *Jolliffe v. Higgins*, 6 Munf. 3, might seem at first blush from the reporter's syllabus of the point decided, to be somewhat in conflict with the principles above stated; but upon closer examination, I think the decision will be found to be in perfect harmony with them and to be abundantly sustained upon the case itself. No reasons are assigned by the court for affirming the judgment, but upon the report of the case, I think we can see ample grounds on which to vindicate its correctness without disturbing any of the principles to which I have averted. The action was *assumpsit* and the declaration counted specially on the draft or order set out, and also for money had and received by the defendant to the use of the plaintiff. The plea was the general issue; and at the trial, the defendant demurred to the evidence. This consisted of the draft or order described in the declaration by which the drawer (the defendant) directed the drawee (Waite) to pay to the plaintiff the sum of one hundred and eight dollars and eighty-five cents which the order stated he (the drawer) had lodged in the hands of the drawee *and was the property of the payee as guardian &c.*, with proof of non-payment by the drawee, and protest therefor, and notice to the drawer; and also that the drawer had never deposited any such funds or other funds whatsoever with the drawee. Now, I do not think it by any means clear that the order was not good as a bill of exchange. Mr. Wickham for the plaintiff in error, it is true, contended that it was not because it was not made payable to order, and was drawn on a particular fund; and this Mr. Leigh appears to have conceded. Formerly it was doubted whether it was not essential to the character of a bill of exchange that it should be payable, *e. g.*, to A or his order or to bearer. But it is now well settled that it is not essential to the character either

of a bill of exchange or of a promissory note that it should be negotiable. (*Chadwick v. Allen*, Str. R. 706; *Smith v. Kendall*, 6 T. R. 123; *The King v. Box*, 6 Taunt. R. 325; *Burchell v. Slocock*, 2 Ld. Raym. R. 1545; Bayly on Bills, ch. 1, § 10, p. 33; Chitty on Bills, ch. 5, p. 181; Story on Bills, § 69.) And it may with great force be contended that the order to pay was neither conditional nor restricted to any particular fund, but as well as can be ascertained from the statement of the case, was absolute and unconditional to pay the amount. It is true it was added that the drawer had lodged the amount in the hands of the drawee and that it was the property of the payee. Whether this statement was true or false would not affect the character of the order. The theory of every bill of exchange is that the drawer has funds in the hands of the drawee subject to his order, and whether this be true or false the character of the bill is the same. (See Story on Bills, § 13.) The reason given for making the draft would not necessarily change the absolute character of the order, or whether true or false, affect its legal character and incidents. It would seem to fall rather within a class of cases which are carefully distinguished from those in which the order is to pay out of a particular fund, although at first glance they might seem to be of them. Thus a bill drawn by a freighter payable to a person entitled to receive the freight "on account of freight," is good, for it is not payable out of a particular fund but merely shows to what account it is to be applied or what is the value that has been received. (*Pierson v. Dunlop*, Cowp. R. 571.) So a bill for money as "the drawer's quarter's half pay by advance" is good; for it is not payable out of a particular fund but is to be paid in advance; and will be payable whether the half pay ever become due or not. (*Macleed v. Snee*, 2 Stra. R. 762.) And so specifying the fund in any other manner out of which the value was received for which the bill is drawn will not vitiate the bill; thus stating "value received out of the premises in *Rosemary Lane*," or "being a portion of a value, as under, deposited in security of payment hereof;" or "on account of wine had by me" (the drawer); or "being so much due by me to A. at Lady-day next." In these cases the bill is not payable out of a particular fund, but it only specifies the value received and the occasion of the draft. (See *Haussoullier v. Hartsinck*, 7 T. R. 733. Bayly on Bills, p. 18; Story on Bills, § 47.)

But if the order could not be treated as a bill of exchange, certainly from its terms it might be fairly and legitimately inferred that the defendant had had in his hands money belong-

ing to the plaintiff which he had failed to pay over to him and which he falsely pretended by the order he had lodged in Waite's hands for him. The amount therefore would clearly be recoverable in an action for money had and received and the demurrer to the evidence could not avail the defendant.

The court may therefore have thought either that the order in this case was good as a bill of exchange, or that the evidence was sufficient to sustain the second count of the declaration, and that the judgment was therefore right, and should be affirmed.

All contracts by our law must be either contracts by specialty or contracts by parol. If not by sealed instrument, they are parol whether verbal or in writing, and if in writing, whatever may be the rule of the civil law, or whatever the doubt created by the remarks of Lord Mansfield and Justice Wilmot in *Pillans v. Mierop*, 3 Burr. R. 1668, *et seq.*, there must be in general a sufficient consideration to support them, just as if they were proved by parol evidence only. The authorities for this proposition are numerous and familiar, and I deem it unnecessary to stop to cite any. Commercial paper and perhaps promises in writing for the payment of money on which debt would lie under our statute, constitute exceptions to the rule, but otherwise it is universal and pervading. Accordingly, the defendant in error recognizing the rule and its applicability to this case, asked the court to instruct the jury that they might infer the consideration from the paper itself, and the court gave the instruction asked. The whole case then is resolved into the enquiry whether the paper does of itself, furnish proof of a legal promise and a sufficient consideration?

Now I apprehend that a paper of this character can only be said to furnish such proof, where the consideration is stated in it or it is stated to be for value received, or some equivalent, or where the terms in which it is expressed are inconsistent with any other theory than that it was upon a consideration. If those terms are just as consistent with the theory of a total want of consideration as they are with that of its existence, it would seem impossible to say that they afford such a legal presumption that the paper was founded on a consideration as would justify the jury in finding it as a fact. In the paper in question, no consideration is stated nor is the draft stated to be made "for value received," nor are any equivalent terms used showing that it was made for a consideration. And taking all the terms of the paper together they are at least as consistent with the theory of an absence of all consideration as they are with that of any value received. The terms of the order would admit equally well of

several different constructions. The drawer might have known that he had just such a sum in the hands of the drawee and intended merely to give authority to the latter to deliver the same to the payee for him. Or without knowing whether the trustee had received funds for him or not, might have merely given the order if he had, to authorize the payee to receive them for him as his agent. The counsel for the defendant in error, it is true, asserts that the order was drawn at a time and at a place at which the plaintiff's intestate might have as conveniently drawn his funds from the hands of the drawee himself as Booker the payee could do it for him. Nothing of this however appears in the record, nor does it appear, as is also alleged, that the intestate was a partner of the firm of Norvell & Averett. If these facts would have influenced the case they were not before the jury, there being, as has been stated, no evidence whatever except the order itself, and proof of non-payment, and that there were no effects out of which it could be paid. So, it is perfectly in consistence with the terms of the order, that it may have been drawn for the purpose of loaning the amount to the payee if the drawer had the funds in the hands of the drawee, or of making a gift to him of the amount if it could be had. Either of these hypotheses and others that might be suggested are just as reasonable as that insisted on by the defendant in error that the order was given in discharge of a debt due him from the payee; and I cannot think the circumstance that the order calls for interest on the sum named from a given day is of such conclusive import as is attributed to it by the counsel. Whilst it is strictly consistent with the existence of a debt that was thereby settled, it is not inconsistent with either of the other hypotheses suggested.

The court having given the instructions asked for, ignored all the other hypotheses than that of a debt due to the payee from the drawer or of value received by the latter; and as the jury were told they might infer a consideration from the paper itself, they could only regard it as peremptory to them to make that inference, because if they might infer it, it was their duty to infer it; and to say that they might infer it was equivalent to saying that they must infer it because it was a matter not depending on the weight of evidence or force of circumstance but simply upon the legal import of the paper itself.

I think the Circuit Court erred in giving the instruction asked for, and am of opinion to reverse the judgment.

ALLEN, P. and DANIEL J. concurred in the opinion of LEE, J.
MONCURE, J., concurred in the result.

Judgment reversed.

WHAT CONSTITUTES CONSIDERATION.

§ 27.

Coddington v. Bay (1822), 20 Johns. 636, 11 Am. Dec. 342.

Appeal from the Court of Chancery. The bill, filed June 15, 1819, by the respondent against the appellants, stated, that in April, 1819, being the owner of a vessel called the *Express*, he employed R. & S., who were merchants and copartners in trade, in New York, to sell her, on a credit, and instructed them to take good approved notes in payment, and to transmit them forthwith to him, with an account of their charges, which should be immediately paid, with which instructions R. & S. engaged to comply. That R. & S. sold the vessel for 3,875 dollars, and on the 3d of June, 1819, received from the purchaser, six promissory notes, dated May 5, 1819, at two, four and six months, payable to R. & S., or order, which they refused to deliver to the respondent. That R. & S. became insolvent, and delivered the notes to the appellants, J. J. & J. C. Coddington, who were under large advances and responsibilities for R. & S. The bill charged, that the appellants, when they received the notes of R. & S., knew that they had been given in payment for the vessel belonging to the respondent, which had been sold for his account by R. & S. The bill prayed, that the appellants might be decreed to deliver up, and account to the respondent for the notes. The answer admitted that R. & S. had stopped payment when they delivered the notes to the appellants, who admitted, that when they received the notes, R. & S. were not actually indebted to them, otherwise than that they were under large gratuitous responsibilities for R. & S., as endorsers of notes for their accommodation, payable at different times, but subsequent to the 12th of June, 1819, and which they were, afterwards, obliged to take up as they fell due. The appellants denied all knowledge of the manner in which the notes had come to the hands of R. & S., and they alleged, that they believed them, at the time, to be the exclusive and *bona fide* property of R. & S., and received them, with others, to indemnify them, as far as they would avail, for their responsibilities. That three days after the notes were delivered to them, they disposed of some of them for cash; and did not know, until several days afterwards, that they belonged to the respondent, as stated in his bill. R. & S., in their answer, say, that when they received the notes of the purchasers of the vessel, they gave their guaranty against any demands existing against the vessel previous to the

sale, and paid her bills in New York, amounting to 48 dollars and 14 cents, and that their commissions on the sale amounted to 96 dollars and 87 cents, and that they had received no counter security for their guaranty. Replications were filed to the answers, but no proofs were taken in the cause, which was brought to a hearing on the pleadings; and on the 8th of January, 1821, the chancellor decreed, that the appellants were not entitled to the notes, or the proceeds thereof, as against the respondent, who was the lawful owner of them when they were transferred to the appellants; inasmuch as they did not receive the notes in the course of business, nor in payment, in whole, or in part, of any then existing debt, nor for cash, or property advanced, or debt created, or responsibility incurred on the credit of the notes; and he directed a reference to a master to compute the amount of the notes, with interest; and that the appellants, and R. & S., or some, or one of them, pay to the respondent the sum that should be reported as the amount of the notes and interest, in thirty days after the report was filed, and notice thereof, &c.; and that R. & S. pay to the respondent his entire costs of suit, to be taxed, and that he give credit upon those costs for the charges and commissions due from him to R. & S., on the sale of the vessel, and that the respondent have execution for the balance; but that no costs be allowed to the respondent, or the appellants, J. J. & J. C. Codrington, as against each other. From this decree an appeal was entered to this court.

Van Buren, for the appellants.

S. Jones, contra.

WOODWORTH, J. Randolph & Savage were the agents of the respondent, and, as such, held certain promissory notes belonging to him, which they, on the 12th of June, 1819, fraudulently, and without authority, passed to the appellants. It is stated, in the answer, that at the time the notes were received by the appellants, Randolph & Savage *were not, in a strict legal sense*, indebted to them in any amount whatever; but that the appellants were under engagements and responsibilities for them, having endorsed certain notes for R. & S., and lent them their own notes to a large amount, none of which had then fallen due. That the appellants received the notes in question as a guaranty and indemnity against the responsibilities they were under, (all of which were then contingent,) and without notice of any interest, right or title of the respondents.

The prayer of the bill is, that the notes so received be delivered to the respondent, or the amount paid to him.

This brief statement presents a case of hardship, let the loss fall as it may, inasmuch as no fraud is imputable to either of the parties concerned in this appeal. The question is one of strict law, in the decision of which, the community at large, and more especially the commercial part, have a deep interest. Any fluctuation in the law relating to bills of exchange and promissory notes, would be a serious evil, and necessarily affect the circulation of this species of paper: distrust, and want of confidence, would embarrass mercantile operations, unless the rule to be applied be stable and uniform. With this view, I have carefully examined the cases cited on the argument. The general rule laid down seems to be this, that where negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner; all the cases substantially agree in this. In the application of the rule, this question arises, What is that *valuable consideration* intended, which shall protect the holder as against the drawer of the note? Is the rule satisfied, if enough is shown to make out a consideration, as between the holder and the agent, who assigned or transferred the paper? If nothing more is required, the appellants must prevail; for the notes were passed for the indemnity of the appellants, and, so far as Randolph & Savage are concerned, that formed a valid consideration. The right to hold against the owner, in any case, is an exception to the general rule of law; it is founded on principles of commercial policy. The reason of such a rule would seem to be, that the innocent holder, having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection. But what superior equity has the holder, who made no advances, nor incurred any responsibility on the credit of the paper he received, whose situation will be improved, if he is allowed to retain, but, if not, is in the condition he was before the paper was passed? To allow such a state of facts as sufficient to resist the title of the real owner, would be productive of manifest injustice, and is not required by any rule of policy; it is enough if the holder be secure when he advances his funds, or makes himself liable on the credit of the paper he receives. In coincidence with this principle, it appears to me, all the cases have been decided; for, although the rule is laid down generally, and the holder will be protected where the bill or note is taken in the usual course of trade, and for a fair and valuable consideration without notice, in every case I have met with, where

the owner failed to recover, it appeared that the holder gave credit to the paper, received it in the way of business, and gave money or property in exchange. In *Miller v. Race* (1 Burr. Rep. 452) it is stated, that the mail was robbed, a bank note taken out, and afterwards passed to the plaintiff, an inn-keeper, who took it *bona fide, in his business, for a valuable consideration*, and without notice; it was held, that the plaintiff was entitled to the note. In *Grant v. Vaughan*, (3 Burr. Rep. 1526) the plaintiff took a bill of exchange that had been lost, and paid the value of it; it was held that he was entitled to the bill. Mr. Justice Wilmot, in that case, observes, "Though both the claimants were innocent, yet, as Grant took the note in the course of trade, *bona fide*, and upon a valuable consideration, Grant has the better equity." Upon what is this better equity founded? Because Grant parted with his property *for the bill*, and was an innocent holder. In *Peacock v. Rhodes*, (Doug. Rep. 633) it was held, that an innocent endorsee might recover on a bill of exchange with a blank endorsement, which had been stolen and negotiated; but it appeared, that the person who transferred the bill, bought cloth and other articles in the way of the plaintiff's trade, as a mercer, and received the value. Lord Mansfield says, "The jury have found that the bill was received in the course of trade, and, therefore, the case is clear, and within the principle of all the cases, from that of *Miller v. Race*, downwards." So, also, in the case, of *Collins v. Martin*, (1 Bos. & Pull. 648) it was held, that if A. deposit bills endorsed in blank with B., his banker, to be received when due, and the latter raises money on them, by placing them with C., and, afterwards, becomes bankrupt, A. cannot maintain trover against C. for the bills. In that case, as in all the preceding, the holder paid value for the bill; an advance was made in money; had that not been made out, it is evident to my mind that the holder would not have been protected. Chief Justice Eyre, in giving the opinion of the court, observes, "If the holder gave no value for the bill, he would be affected by everything which would affect the first holder." What is meant by giving value for the bill, must be collected from the whole case of which he is speaking. The holder, in that case, advanced his money on the credit of the bill. The language of the court cannot be mistaken: something must have been paid in money or property, or some existing debt satisfied thereby, or some new responsibility incurred in consequence of the transfer; this would be paying value, and making out a good consideration within the reason and meaning of the rule. In such a case, the holder of a bill of exchange or promis-

sory note, is not to be considered in the light of an assignee of the payee, and bound to take the thing assigned, subject to all the equity to which the original party was subject; but he stands on the ground of an innocent purchaser of negotiable paper, who, having parted with his property, is entitled to the benefit resulting from his purchase, in opposition to the right owner. So, also, in *Lawson v. Weston*, (4 Esp. N. P. Rep. 56) where a lost bill had been discounted, the plaintiff recovered. Lord Kenyon considered the point settled by the case of *Miller v. Race*, and observed, "If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, they could not recover." The general rule is to be understood as applicable to cases of this description; there does not seem to be any necessity to go further. The credit of bills and notes cannot be impaired, or their circulation impeded, if the right of the holder is limited and restricted in this manner. He still retains all the rights that the law intended to confer on him, or that commercial policy can reasonably require. To deny the relief prayed for by the respondent, would introduce a new rule, not warranted by any of the adjudged cases.

Every man who takes negotiable paper, is supposed to know, that he does not acquire an indefeasible right. A note given for money won at play, or upon a usurious consideration, may be inquired into in the hands of an innocent endorsee. Does this obstruct the circulation of bills or notes? So every holder knows, or is presumed to know, that the title of the right owner cannot be divested, unless value has been given, or liability incurred. The rule, then, as I conceive, is well established, and must govern the present case. The question is, whether the appellants are within its provisions. Randolph & Savage had stopped payment, and were insolvent, which was known to the appellants at the time they received the notes. They were not *then* indebted to the appellants, for none of the notes were due; the liability of the appellants was still contingent, although it was admitted there was good reason to believe it would soon become absolute. No responsibility was incurred in consequence of taking the notes; they were received as an indemnity; the situation of Randolph and Savage was desperate, and no doubt the appellants were anxious to get hold of anything that had the semblance of security. If the notes became effectual in their hands, then so much was gained; if not, they remained in *statu quo*. The mere probability that the notes would be valid in their hands, was inducement enough to seize on them with avidity; it might be the

means of rescuing something from the shipwreck. Very different is the case of a holder for value paid; he makes the advance on the credit of the paper; if that fails, his loss is certain. But it has been urged, that if the appellants had not reposed themselves on the rule now contended for, they might have obtained other security, and, consequently, they are prejudiced by the decree. This argument cannot be listened to; it only proves that the appellants may sustain an injury in consequence of mistake as to the rule of law. With this the court has no concern. The true question is. Have they paid value for the notes, or made any new engagements as the consideration of the transfer? This is not pretended. I am, therefore, of opinion, that the decree of his honor the chancellor ought to be affirmed.

PLATT, J., concurred.

Decree of affirmance.

Swift v. Tyson (1842), 16 Pet. (41 U. S.), 1.

On a certificate of division from the Circuit Court of the United States for the Southern District of New York.

This action was instituted in the Circuit Court upon a bill of exchange, dated at Portland, in the State of Maine, on the first day of May, 1836, for one thousand five hundred and thirty-six dollars and thirty cents, payable six months after date, drawn by Nathaniel Norton, and Jairus S. Keith, upon and accepted by the defendant, the bill having been drawn to the order of Nathaniel Norton, and by him endorsed to the plaintiff. The principal and interest on the bill, up to the time of trial, amounted to one thousand eight hundred and sixty-two dollars and six cents. The defence to the action rested on the answers to a bill of discovery filed by the defendant against the plaintiff; by which it appeared that the bill had been received by him from Nathaniel Norton, with another draft of the same amount in payment of a protested note drawn by Norton and Keith, and which had been paid by him to the Maine Bank. When the draft was received by the plaintiff, it had been accepted by the defendant, who resided in New York. The plaintiff had no knowledge of the consideration which had been received for the acceptance, and had no other transaction with the defendant. He had received the drafts and acceptances in payment of the protested note, with a full belief that the same were justly due, according to their tenor; and he had no other security for the payment of the protested note except

the drafts, nor had he any knowledge of any contract or dealing between the defendant and Norton, out of which the said draft arose.

The defendant then offered to prove that the bill of exchange was accepted by him as part consideration for the purchase of certain lands in the State of Maine, of which Keith and Norton, the drawers of the bill, represented themselves to be the owners, and represented them to be of great value, made certain estimates of them which were warranted by them to be correct, and also contracted to convey a good title to the land; all of which representations were in every respect fraudulent and false; and that said Keith and Norton have never been able to make a title to the lands: whereupon the plaintiff, by his counsel, objected to the admission of said testimony, or any testimony, as against the plaintiff, impeaching or showing the failure of the consideration on which said bill was accepted, under the facts aforesaid admitted by the defendant, and those proven by him, by reading said answers in equity of the plaintiff in evidence. And the judges of the Court divided in opinion on the point or question of law, whether, under the facts last mentioned, the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, the said Norton, or the said Norton and Keith, and the defendant. And whether the evidence so offered in defence and objected to was admissible as against the plaintiffs in this action.

And thereupon the said point or question of law was, at the request of the counsel for the said plaintiff, stated as above under the direction of the judges of this Court, to be certified under the seal of this Court to the Supreme Court of the United States, at the next session thereof to be held thereafter; to be finally decided by the said last mentioned Court.

Fessenden, for the plaintiff.

Dana, for the defendant.

STORY, J., delivered the opinion of the court.

This cause comes before us from the Circuit Court of the southern district of New York, upon a certificate of division of the judges of that Court.

The action was brought by the plaintiff, Swift, as endorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of one thousand five hundred and forty dollars, thirty cents, payable six months after date and grace, drawn by one Nathaniel

Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favour of the order of Nathaniel Norton, and by Norton endorsed to the plaintiff. The bill was dishonoured at maturity.

At the trial the acceptance and endorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a *bona fide* holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary farther to state them. The defendant then offered to prove, that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the State of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration, on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the

transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the *prima facie* title of the plaintiff.

In the present case, the plaintiff is a *bona fide* holder without notice, for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well as upon general principles, as by the express provisions of the thirty-fourth section of the judiciary act of 1789, ch. 20. And then it is further contended, that by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, *Warren v. Lynch*, 5 Johns. R. 289, the Supreme Court of New York appear to have held, that a pre-existing debt was a sufficient consideration to entitle a *bona fide* holder without notice to recover the amount of a note endorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent in *Bay v. Coddington*, 5 Johns. Chan. Rep. 54. Upon that occasion he said, that negotiable paper can be assigned or transferred by an agent or factor or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration without notice of the fraud. But he added, that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in

the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes; thus directly affirming, that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries, 3 Kent. Comm., sec. 44, p. 81. The decision in the case of *Bay v. Coddington* was afterwards affirmed in the Court of Errors, 20 Johns. R. 637, and the general reasoning of the chancellor was fully sustained. There were indeed peculiar circumstances in that case, which the Court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground either because the receipt of the notes was under suspicious circumstances, the transfer having been made after the known insolvency of the endorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration, sufficient to protect the holders, and others again insisting, that a pre-existent debt was not sufficient. From that period, however, for a series of years, it seems to have been held by the Supreme Court of the state, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favour of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially *Roosa v. Brotherson*, 10 Wend. R. 85; *The Ontario Bank v. Worthington*, 12 Wend. R. 593; and *Payne v. Cutler*, 13 Wend. R. 605, are directly in point. But the more recent cases, *The Bank of Salina v. Babcock*, 21 Wend. R. 490, and *The Bank of Sandusky v. Scoville*, 24 Wend. R. 115, have greatly shaken, if they have not entirely overthrown those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain, that the Court of Errors have not pronounced any positive opinion upon it.

But, admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from the principles established in the general

commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this Court to follow the decisions of the state tribunals in all cases to which they apply. That section provides "that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold, that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true

intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*

It becomes necessary for us, therefore, upon the present occasion to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true, (which, however, may well admit of some doubt from the generality of the language,) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say, that receiving it in payment of or as security for a pre-existing debt, is according to the known usual course of trade and business. And why upon principle should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied

in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this Court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument. The cases of *Coolidge v. Payson*, 2 Wheaton, R. 66, 70, 73, and *Townsley v. Sumrall*, 2 Peters, R. 170, 182, are directly in point.

In England the same doctrine has been uniformly acted upon. As long ago as the case of *Pillans and Rose v. Van Meirap and Hopkins*, 3 Burr. 1664, the very point was made and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion, Lord Mansfield, likening the case to that of a letter of credit, said, that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole court held the plaintiff entitled to recover. From that period downward there is not a single case to be found in England in which it has ever been held by the court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental dicta have been sometimes relied on to establish the contrary, such as the dictum of Lord Chief Justice Abbott in *Smith v. De Witt*, 6 Dowl. & Ryland, 120, and *De la Chaumette v. The Bank of England*, 9 Barn. & Cres. 209, where, however, the decision turned upon very different considerations.

Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms. "The want of consideration," says he, "in toto or in part, cannot be insisted on, if the plaintiff or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valid consideration." (Bayley on Bills, p. 499, 500, 5th London edition, 1830.) It is observable that he here uses the words "valid consideration," obviously intending to make the distinction, that it is not intended to apply solely to cases, where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go farther, and establish, that a transfer as security for past, and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of *Bosanquet v. Dudman*, 1 Starkie, R. 1, it was held by Lord Ellenborough, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, *bona fide*, he is to be considered as holding for value; and it makes no difference though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in *Ex parte Bloxham*, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of *Haywood v. Watson*, 4 Bing. R. 496, and *Bramah v. Roberts*, 1 Bing. New Ca. 469, and *Percival v. Frampton*, 2 Crompt. Mees. & Rose, 180, are to the same effect. They directly establish that a *bona fide* holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions, which our researches have enabled us to ascertain to have been made in the English courts upon this subject.

In the American courts, so far as we have been able to trace the decisions, the same doctrine seems generally but not universally to prevail. In *Brush v. Scribner*, 11 Conn. R. 388, the Supreme Court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a *bona fide* holder against all the antecedent parties to a negotiable note. There is no reason to doubt, that the same rule has been adopted and constantly adhered to in Massachusetts; and certainly there

is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial states, it may fairly be presumed, that whatever constitutes a valid and valuable consideration in other cases of contract to support titles of the most solemn nature, is held *à fortiori* to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt, that a *bona fide* holder, for a pre-existing debt, of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

Mr. JUSTICE CATRON said:

Upon the point of difference between the judges below, I concur, that the extinguishment of a debt, and the giving a post consideration, such as the record presents, will protect the purchaser and assignee of a negotiable note from the infirmity affecting the instrument before it was negotiated. But I am unwilling to sanction the introduction into the opinion of this court, a doctrine aside from the case made by the record, or argued by the counsel, assuming to maintain, that a negotiable note or bill pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the foot of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. State courts of high authority on commercial questions have held otherwise; and that they will yield to a mere expression of opinion of this court, or change their course of decision in conformity to the recent English cases referred to in the principal opinion, is improbable: whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this court, probably, would, and I think ought to settle it. As such a result is not to be expected from the opinion in this cause, I am unwilling to embarrass myself with so much of it as treats of negotiable instruments taken as a pledge. I never heard this question spoken of as belonging to the case, until the principal opinion was presented last evening; and therefore I am not prepared to give any opinion, even was it called for by the record.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the southern district of New York, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the defendant was not, under the facts stated, entitled to the same defence to the action as if the suit was between the original parties to the bill; that is to say, the said Norton, or the said Norton and Keith and the defendant: and that the evidence offered in defence and objected to, was not admissible as against the plaintiff in this action. Whereupon it is now here ordered and adjudged by this court, that an answer in the negative be certified to the said Circuit Court.

Sutherland v. Mead et al. (1903), 80 App. Div. (N. Y.) 103, 80 N. Y. Supp. 504.

Appeal from Special Term, New York County.

Action by George R. Sutherland against Charles H. Mead and Thomas Taft, impleaded. From an order denying a motion to vacate and set aside the judgment, or, in the alternative, to modify it by reducing it to \$150, with interest, defendants Mead and Taft appeal. Reversed.

Argued before VAN BRUNT, P. J., and HATCH, McLAUGHLIN, O'BRIEN, and INGRAHAM, JJ.

A. H. F. Seeger, for appellants.

Edward Hassett, for respondent.

HATCH, J. This action was brought to recover upon a promissory note made by the defendant Deshong, upon which the appellants were accommodation indorsers. It appeared upon the hearing of the motion that the defendant Palleske was indebted to the appellants upon a promissory note for the sum of \$1,000; that as such note was about falling due, and on the 15th day of April, 1902, Palleske requested the appellants to accept in payment of such note the promissory note executed by Deshong, set forth in the complaint in the action; that they refused so to accept the same unless Palleske could procure it to be discounted, and would deliver the proceeds thereof to the appellants, and for such

purpose the appellants indorsed said note in their firm name, and the defendant Palleske took the same, and agreed to return the proceeds thereof to the appellants. Instead of discounting the note, Palleske transferred the same to the plaintiff in the action, who paid thereon the sum of \$150 cash, and, as further consideration, took and held the same as collateral security for an indebtedness then due and owing by Palleske to the plaintiff in a sum exceeding \$3,000, the whole of which still remains due and unpaid. This action was brought by the plaintiff to enforce the note. All of the defendants made default in answering. Judgment was thereupon entered by the plaintiff for the full amount secured to be paid by the note, with interest. Thereafter the accommodation indorsers, the appellants herein, made a motion to open the default, and for leave to serve an answer. The court denied such motion upon the ground that the answer which accompanied the motion papers, and which was proposed to be served as a defense to the note, was insufficient for such purpose, in that it failed to aver the fraudulent diversion of the note in suit, and for this reason the motion was denied. It is clear that the court made a correct disposition of such motion, and placed the denial upon a proper ground. There was no statement in the answer which raised any issue of a fraudulent diversion. Consequently the plaintiff would have been entitled to judgment thereunder. The fraudulent diversion of the note constituted an affirmative defense, and the defendants, in order to avail themselves of it, were required to plead the same. (*Met. Nat. Bank v. Loyd*, 90 N. Y. 530; *Grant v. Walsh*, 145 N. Y. 502, 40 N. E. 209, 45 Am. St. Rep. 626.) Thereupon, without obtaining leave so to do, the appellants made a motion to set aside the judgment, or, in the alternative, to modify the same by reducing the recovery upon the note in suit to the sum of \$150, with interest thereon from the day of its date. This motion was based upon the facts and circumstances connected with the delivery of the note to Palleske, as has been previously stated, and also upon an affidavit made by the plaintiff in the action that he had only paid to Palleske for the note \$150 in cash, and held the same as collateral security for the payment of a pre-existing debt. It was made to appear by the moving papers that the appellants herein were ignorant of the consideration paid by the plaintiff for the note prior to the time when the application was made to open the default, when the affidavit was read. Upon learning these facts, the appellants caused an answer to be prepared, setting up the facts and circumstances connected with the delivery of the note, the indorsement

by the appellants, the fraudulent diversion of the same by Palleske, and the consideration paid therefor by the plaintiff. This motion, upon these papers coming on to be heard, was denied, and from the order entered thereon, this appeal is taken.

The motion to vacate or reduce the judgment was an entirely different motion from the one made to open the default. That was based solely upon the fraudulent diversion of the note, and upon an insufficient answer to raise such question. The present facts were wholly unknown to the appellants at the time when the motion was made. The present motion is for an entirely different purpose, viz., to set aside the judgment, based upon a state of facts, showing that the plaintiff was only entitled to enforce the payment of the note to the extent to which he had parted with value therefor, and, upon the conceded facts, he was not entitled to the judgment which had been entered, unless entitled to enforce the note for the full amount. These facts did not before appear, and were unknown to the moving party. This application was accompanied by a verified answer setting up these facts. It is evident, therefore, that the motion was entirely different from the first motion, made for entirely different relief, and was based upon papers which fully and completely set forth the appellants' defense. It was therefore properly made, and the former motion was no bar to the court's entertaining the same. It is said, however, that the negotiable instrument law has changed the rule in respect to what constitutes consideration for a promissory note; it being claimed that a pre-existing indebtedness is a good consideration, and renders the holder thereof a holder for value of a note taken as security therefor, as against accommodation indorsers, even though the note has been fraudulently diverted from the purpose for which it was given, and the indorsers have received no value. Since 1822, when *Coddington v. Bay*, 20 Johns. 636, 11 Am. Dec. 342, was decided, it has been the settled law of this state that accommodation makers or indorsers of negotiable paper were not liable to a holder thereof, where the same had been fraudulently diverted from the purpose for which it was made, or the indorsement given, and the holder had received it solely as collateral security for an antecedent debt. (*Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142.) In other words, the surety has the right to impose such liability upon his obligation as he sees fit, and he is not to be made liable outside of the terms of his engagement, in the case of negotiable paper, except for the benefit of a bona fide holder, who parted with value, and was misled to his prejudice. (*United States Nat. Bank v. Ewing*, 131 N. Y.

506, 30 N. E. 501, 27 Am. St. Rep. 615.) Whatever may have been the rule with respect to this question in other jurisdictions, it has been the law of this state, uniformly enforced during this period of time, and still is the law, unless the negotiable instrument law has changed the same. Section 51 of such act provides:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

Standing alone, this provision has not changed the existing law. It was always the law of this state that a consideration sufficient to support a simple contract constituted a good consideration for the instrument. This declaration, therefore, upon this subject, added nothing whatever to the law as it existed and had existed from time immemorial. So, also, an antecedent or pre-existing debt constituted value, and was sufficient in consideration of an instrument, either negotiable or otherwise, as between the parties thereto. Moreover, it was always the law that the actual payment and discharge of a pre-existing debt constituted the same a valuable consideration for the transfer of commercial paper, and shut off prior equities existing against it. Such was the rule announced in *Coddington v. Bay*, *supra*, and has since been enforced by the courts of this state. (*Mayer v. Heidelberg*, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850; *Spring Brook Chemical Co. v. Dunn*, 39 App. Div. 130, 57 N. Y. Supp. 100; *Blair v. Hagemeyer*, 26 App. Div. 219, 49 N. Y. Supp. 965.) There is nothing contained in this enactment, therefore, which has changed the rule of law respecting the consideration of commercial paper, as it had previously existed; and the language of the statute is quite insufficient to annul the rule which has obtained with respect to the fraudulent diversion of commercial paper, as against accommodation indorsers thereon. Such rule, therefore, cannot be considered as changed, unless it be by virtue of the other provisions of the statute, showing that such defense is cut off, and indicating a clear intent to change the rule.

Section 52 of the negotiable instruments law defines what constitutes a holder for value:

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

And by section 55 an accommodation party is made liable on the instrument to a holder for value, although such holder at the time of taking the instrument knew him to be only an accom-

modation party. Section 91 defines a holder in due course to be a person who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 94 defines when the title is defective in the person who has negotiated the instrument as follows:

"When he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Section 95 provides that the holder must have "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." By section 96 the rights of a holder in due course are defined to be:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"By section 98 it is provided:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

It is evident from these provisions that the Legislature did not intend to wipe out the defenses to a promissory note where the same had been procured from the maker by fraud, or where the indorsement has been given for a specific purpose, and a fraudulent diversion of the paper has been had. If the holder took the same with notice of such facts or circumstances as charged him with notice, or if he parted with no value, it constitutes a good defense to such note. As the definition of value for a promissory note has not added anything to the law upon that subject beyond such as was previously recognized, we ought not to conclude that the Legislature intended to change the rule with respect thereto, nor to permit frauds to be perpetrated thereunder. When

the Legislature defines a defective title, it states in express terms that a fraudulent diversion is such. All of these sections can be harmonized, in their entirety, without any subtle refinement of reasoning, by construing section 51 to mean that, to constitute an antecedent or pre-existing debt a valuable consideration in support of a promissory note that has been fraudulently diverted, as valid in the hands of a *bona fide* holder, the latter must have canceled, and, in legal effect, paid and discharged, the antecedent or pre-existing debt. By still holding the debt, he in fact parts with no value. It was not intended thereby that where a debt continued to remain in existence, and enforceable as such, and the note is taken as collateral security for its payment, such debt, undischarged, constitutes a valuable consideration, or the holder of the note one in due course, as against the accommodation maker or indorser who has been defrauded by the negotiation of the instrument. We are not to impute to the Legislature an intent to change a rule of law which has existed in uniform course of enforcement for over three-quarters of a century, without a clear and unequivocal expression so to do. The rules of law which have been laid down in England, covering such question, or the reasons assigned for a different rule in other jurisdictions in this country, do not furnish controlling reasons for changing the law of this state so as to bring it into harmony with such views, in face of the fact that in the commercial center of this country these rules have been applied for this length of time without damage to business interests or harm to commercial usages, and during its operation a period of commercial activity and prosperity has existed, heretofore unknown in the world's history. We may take judicial notice that the commission appointed to revise and codify the statutes was created, in the main, to codify existing laws, and not make new rules; and certainly it was never intended that settled usages in respect of commercial paper, founded upon decisions covering a period of 80 years, and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such body. The harmony of these provisions of the statute is in no measure disturbed by a construction which causes them to read that an antecedent and pre-existing debt must be paid and discharged, in order to constitute the holder of commercial paper, which has been fraudulently diverted, a *bona fide* holder, and, as such, capable of enforcing the same, as against the accommodation maker or indorser. Merely taking such paper as collateral security for the payment of a pre-existing or antecedent debt does

not constitute such debt value, within the meaning of this statute. This matter does not seem to have been the subject of discussion, beyond that had at Special Term in the case of *Brewster v. Shrader*, 26 Misc. Rep. 480, 57 N. Y. Supp. 606, where a different rule was laid down. The authority cited therefor in the opinion is contained in the reviser's note by the author of the law, in which it is stated that section 51 was designed to change the rule in *Coddington v. Bay*, *supra*, and the opinion of James W. Eaton, Esq., instructor upon the law of bills and notes in the Albany Law School, wherein he says, in his published edition of the negotiable instruments law, in referring to section 51, "It is to be inferred that the above statute extends the New York rule to include instruments given merely as collateral security." We are not disposed to adopt this construction of the law. Settled principles ought not to be overturned by imputing a legislative intent where the language upon which it is based is equivocal in expression, and when the language used which it is claimed changes the rule may be naturally harmonized with the decisions of the courts, which have settled the law plainly and conclusively, and with respect to which commercial dealings have been governed in this state for over 80 years. But even though we should be wrong in our construction of this statute, nevertheless it does not change the rule of law to be applied in the particular case. As we have seen by section 98, above quoted, the burden is placed upon the holder of every promissory note, fraudulently diverted, to show that he acquired title thereto as a holder in due course. Nothing which appears in these papers tends to controvert the fact that the note in question was fraudulently diverted. The proof upon such subject, submitted in the moving papers, is clear and unequivocal. The answer sets it up as a defense. Before the plaintiff, therefore, could recover, he must show that he acquired the paper in due course, and without knowledge of any infirmity attending upon it. Under the pleadings an issue of fact upon this question may be presented, and these appellants are not to be made to suffer through the fraud that has been perpetrated upon them, if the plaintiff had notice of such fact, and the appellants ought to have an opportunity to be heard upon this subject. The doctrine of estoppel, based upon the certificate that the note was a genuine business note, given for value received, and that there was no defense to the same, either in law or in equity, does not estop the appellants from interposing the defense of fraudulent diversion. The certificate was in harmony with the facts. It was genuine business paper, executed for a particular purpose,

and, in the hands of a holder in due course, may be enforced. In order to constitute an estoppel in pais, it must appear that the act which concludes the party was expressly designed to influence the conduct of another, and did so influence him, and when a denial of the act will operate to the injury of the holder. (*Payne v. Burnham*, 62 N. Y. 69.) Such is the doctrine of the cases cited by the respondent. They are without application in the present case, for the reason that the certificate can add nothing to the rights of the present holder of the note. If the note had been delivered to him without consideration, he could not have enforced it against these accommodation indorsers, as he would not have been misled or injured by the certificate which was given. To the extent that he parted with value, he is entitled to enforce the note, with or without the certificate. In holding it as collateral security for the payment of his pre-existing debt, the certificate in no wise prejudices him, as he has suffered nothing thereby, and parted with no value on account thereof.

If these views be correct, it follows that the order should be reversed, and the judgment set aside, upon payment of costs and disbursements of the action, and \$10 costs of the motion, to the respondent, and defendants allowed to answer. As the defendant appellants, however, admit liability to the extent of \$150 interest and costs, the plaintiff in the action may, if he so elects, stipulate to reduce the judgment to such amount, in which event the judgment, to that extent, should be permitted to stand, and be enforced. Ten dollars costs and disbursements of this appeal to the appellants. All concur. See Crawford's Ann. Neg. Inst. Law, p. 32; *Roseman v. Mahony*, 86 App. Div. (N. Y.) 377. Until a decision of the Court of Appeals on the point involved, the construction of the statute adopted by this case will be open to question.

WHAT CONSTITUTES HOLDER FOR VALUE.

§ 28.

Hoffman & Co. v. Bank of Milwaukee (1870), 12 Wall (79 U. S.) 181.

Error to the Circuit Court for the District of Wisconsin; the case being thus:

Chapin & Miles, a forwarding and commission firm in Milwaukee, were engaged in moving produce to Hoffman & Co., of Philadelphia, for sale there. The course of their business was thus: They first shipped the produce, obtaining a bill of lading

therefor, to which they attached a draft drawn by them on their consignee for about the value of the grain, and then negotiated the draft with bill of lading attached, to some bank in Milwaukee, and obtained the money. It was understood that the draft was drawn upon the credit of the property called for by the bill of lading, and would be paid by the consignee upon receipt of the bill of lading; and—with perhaps a single exception where the bills of lading, not being obtained during bank hours, was sent otherwise than with the draft—the drafts were accompanied by such bills. The Philadelphia firm, however, rarely knew what flour belonged to any particular bill of lading; not being obliged by the railroad clerks at Philadelphia, where they were known, to exhibit any bill of lading in order to get the flour, and their custom being, on getting notice from the railroad office that flour had arrived for them, to pay the charges, give receipts, and send their drayman for it, and bring it away. It was the practice of the Milwaukee firm to advise their Philadelphia correspondents by letter of shipments made and drafts drawn, which advisements were acknowledged with a promise “to honor *the drafts*.” When flour was “slow” in going forward they corresponded with the Milwaukee house about it, but did not on that account refuse acceptance or payment of any bill.

Having been thus dealing for about sixteen months, Chapin & Miles drew three drafts on Hoffman & Co., in the ordinary way, and attaching to them bills of lading which they had forged, negotiated, in the ordinary course of business, the drafts, with the forged bills of lading attached, to the City Bank of Milwaukee, getting the money for them. The bank knew nothing of the forgery of the bills of lading. The ordinary correspondence between the two houses took place. That in regard to one draft will exhibit its character.

“MILWAUKEE, February 26th, 1869.

“*Messrs Hoffman & Co., Philadelphia.*

“DEAR SIR: We ship to you today 200 bbls. ‘Prairie Flour,’ and draw at s’t for \$1100, which please honor. Will draw for \$5 only when we can, but must crowd \$5½ part of the time.

“Yours truly,

“CHAPIN & MILES.”

"PHILADELPHIA, March 2d, 1869.

"*Messrs. Chapin & Miles.*

"GENTLEMEN: Yours 26th ult. here. Your *draft \$1100, will be paid*, but we think you should try to keep them down to \$5 per barrel. We advise sale of 100 Prairie, at \$7, and 54, at \$7.25.

"Yours respectfully,

"HOFFMAN & Co."

No flour was forwarded. The Milwaukee bank forwarded the drafts, however, with the forged bills of lading attached, to their correspondent, the Park Bank in New York, for collection. The Park Bank forwarded the same to its correspondent, the Commonwealth Bank of Philadelphia, for the same purpose, and the latter bank presented the draft and bill of lading to the drawees, Hoffman & Co., who, knowing the drafts to be genuine, and not supposing that the bills of lading were otherwise, paid the drafts to the Philadelphia bank, which remitted the money back to the Park Bank to the credit of the Bank of Milwaukee.

No flour coming forward, Hoffman & Co. discovered that the bills of lading were forged, and Miles & Chapin being insolvent, they sued the Bank of Milwaukee to recover the amount paid, as above stated.

The declaration in the case contained the common counts in assumpsit, with a notice, attached, to the defendant, "that he action was brought to recover \$3100, money paid by the plaintiff, under mistake of fact, upon drafts and bills of lading (of which copies were annexed), the mistake being that the plaintiffs paid the money upon the belief that the said bills of lading were genuine instruments; whereas, in fact, they were forged; the amount of money paid being the amount called for by the drafts, which was paid upon the credit and inducement of the bills of lading."

Neither the name of the defendant, the Milwaukee bank, nor of any of its officers or agents, appeared in or upon the bills of lading in question, and had it not been for extrinsic evidence, it could not have been told from those bills that the bank had had anything to do with them. Nor had the bank had any dealings or correspondence of any kind with the Philadelphia house, relative to the shipments of flour by Chapin & Miles, or relative to the drafts drawn by them.

On this case the court below directed the jury to find for the bank, defendant in the case, and the plaintiffs brought the case here.

Mr. M. H. Carpenter, for the plaintiff in error.

Mr. J. W. Cary, contra.

Mr. JUSTICE CLIFFORD delivered the opinion of the court.

Acceptors of a bill of exchange, by the act of acceptance, admit the genuineness of the signatures of the drawers, and the competency of the drawers to assume that responsibility. Such an act imports an engagement, on the part of the acceptor, to the payee or other lawful holder of the bill, to pay the same, if duly presented, when it becomes due, according to the tenor of the acceptance. He engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity, and if he does not, the holder has a right of action against him, and he may also have one against the drawer. Drawers of bills of exchange, however, are not liable to the holder under such circumstances, until it appears that the bill was duly presented, and that the acceptor refused or neglected to pay the same according to the tenor of the instrument, as their liability is contingent and subject to those conditions precedent.

Three bills of exchange, as exhibited in the record, were drawn by Chapin, Miles & Co., payable to the order of the defendants, and the records show that they, the defendants, received and discounted the three bills at the request of the drawers. Attached to each bill of exchange was a bill of lading for two hundred barrels of flour, shipped, as therein represented, by the drawers of the bills of exchange, and consigned to the plaintiffs; and the record also shows that the drawers, in each case, sent a letter of advice to the consignees apprising them of the shipment, and that they would draw on them as such consignees for the respective amounts specified in the several bills of exchange. Prompt reply in each case was communicated by the plaintiffs, acknowledging the receipt of the letter of advice sent by the shippers, and promising to honor the bills of exchange, as therein requested. Evidence was also introduced by the plaintiffs showing that the defendants indorsed the bills of exchange and forwarded the same, with the bills of lading attached, to the National Park Bank of the city of New York, their regular correspondent; that the same were subsequently indorsed by the latter bank, and forwarded to the Commonwealth Bank of Philadelphia for collection; that the Commonwealth Bank presented the bills of exchange, with the bills of lading attached, to the plaintiffs, as the acceptors, and that they paid the respective amounts as they had previously promised to do, and that the Commonwealth Bank remitted the proceeds in each case to the National Park Bank, where the respective amounts were credited to the defendants. Proof was also introduced by the plaintiffs

showing that each of the bills of lading was a forgery, and that the plaintiffs, before the commencement of the suit, tendered the same and the bills of exchange to the defendants, and that they demanded of the defendants, at the same time, the respective amounts so paid by them to the Commonwealth Bank. Payment as demanded being refused, the plaintiffs brought an action of assumpsit against the defendants for money had and received, claiming to recover back the several amounts so paid as money paid by mistake, but the verdict and judgment were for the defendants, and the plaintiffs sued out a writ of error, and removed the cause into this court. Testimony was also introduced by the defendants tending to show that the shippers were millers; that they made an arrangement with the plaintiffs to ship flour to them at Philadelphia for sale in that market, the plaintiffs agreeing that they, the shippers, might draw on them for advances on the flour, to be reimbursed out of the proceeds of the sales; that for more than a year they had been in the habit of shipping flour to the plaintiffs under that arrangement and of negotiating drafts on the plaintiffs to the banks in that city, accompanied by bills of lading in form like those given in evidence in this case; that the drafts, with the bills of lading attached, were sent forward by the banks, where the same were discounted, and that the same were paid by the plaintiffs; that the drawers of the drafts in every case notified the plaintiffs of the same, and that the plaintiffs, as in this case, answered the letter of advice and promised to pay the amount. They also proved that the drawers of the drafts in this case informed their cashier that the same would always be drawn upon property, and that the bills of lading would accompany the drafts, and that they had no knowledge or intimation that the bills of lading were not genuine. Instructions were requested by the plaintiffs, that if the jury found that the respective bills of lading were not genuine, that they were entitled to recover the several amounts paid to the Commonwealth Bank, with interest; but the court refused to give the instruction as prayed, and instructed the jury that if they found the facts as shown by the defendants, the plaintiffs could not recover in the case, even though they should find that the several bills of lading were a forgery.

Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent

indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. (*Fitch v. Jones*, 5 Ellis & Blackburn, 238; *Arbouin v. Anderson*, 1 Adolphus & Ellis, N. S. 498; *Smith v. Braine*, 16 Id., N. S. 244; *Hall v. Featherstone*, 3 Hurlstone & Norman, 287).

Such an instrument, as between the payee and the acceptor, imports a sufficient consideration, and in a suit by the former against the latter the defence of prior equities, as between the acceptor and drawer, is not open unless it be shown that the payee, at the time he became the holder of the instrument, had knowledge of those facts and circumstances.

Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount and paid the full amount of the net proceeds of the same to the drawers, and it is not even suggested that any act of the defendants, except the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the true character of the transaction. On the contrary, it distinctly appears that the drawers of the bills of exchange were the regular correspondents of the plaintiffs, and that they became the acceptors of the bills of exchange at the request of the drawers of the same and upon their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale under the arrangement before described.

Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing

of the parties to the same, but it is clear that they are not a part of those instruments nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange.

Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified, as the lien, if any, in favor of the defendants was then displaced and the plaintiffs became entitled to the instruments as the muniments of title to the flour shipped to them for sale and as security for the money which they had advanced under the arrangement between them and the drawers of the bills of exchange. Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. (*Leather v. Simpson*, Law Reports, 11 Equity, 398).

Different rules apply between the immediate parties to a bill of exchange—as between the drawer and the acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defence to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title, and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. (*Robinson v. Reynolds*, 2 Q. B. 202; *Same v. Same*, in error, *Ib.* 210; Byles on Bills [5th Am. Ed.], 124; *Thiedemann v. Goldschmidt*, 1 De Gex, Fisher & Jones, Ch. App. 10).

Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name

of a remote indorsee against the acceptor, that if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff. (*Hunter v. Wilson*, 4 Exchequer 489; *Boyd v. McCann*, 10 Maryland, 118; *Howell v. Crane*, 12 Louisiana Annual, 126; *Watson v. Flanagan*, 14 Texas, 354).

Where it was arranged between a drawer and his correspondent that the latter would accept his bills in consideration of produce to be shipped or transported to the acceptor for sale, the Supreme Court of Pennsylvania held, (*Craig v. Sibbett et al.*, 15 Pennsylvania, 240), that the acceptor was bound to the payee by his general acceptance of a bill, although it turned out that the bill of lading forwarded at the same time with the bill of exchange was fraudulent, it not being shown that the payee of the bill was privy to the fraud. Evidence was introduced in that case showing that the payee knew what the terms of the arrangement between the drawer and the payee were, but the court held that mere knowledge of the fact was not sufficient to constitute a defence, as the payee was not a party to the arrangement and was not in any respect a surety for the good faith and fair dealing of the shipper.

Failure of consideration, as between the drawer and acceptor of a bill of exchange, is no defence to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument. (*United States v. Bank of Metropolis*, 15 Peters, 393).

Testimony to show that the payees were not *bona fide* holders of the bills would be admissible in a suit by them against the acceptors, and would constitute, if believed, a good defence, but the evidence in this case does not show that they did anything that is not entirely sanctioned by commercial usage. They discounted these bills and they had a right to present them for acceptance, and having obtained the acceptance they have an undoubted right to apply the proceeds collected from the acceptors to their own indemnity. (*Thiedemann v. Goldschmidt et al.*, 1 De Gex, Fisher & Jones, Ch. App. 10; *Robinson v. Reynolds*, 2 Q. B. 211).

Forgery of the bills of lading would be a good defence to an action on the bills if the defendants in this case had been the

drawers, but they were payees and holders for value in the regular course of business, and the case last referred to, which was decided in the Exchequer Chamber, shows that such an acceptance binds the acceptor conclusively as between them and every *bona fide* holder for value.

Very many cases decide that the drawee of a bill of exchange is bound to know the handwriting of his correspondent, the drawer, and that if he accepts or pays a bill in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted he must pay, and if he has paid he cannot recover the money back, as the money, in such a case, is paid in pursuance of a legal obligation as understood in the commercial law. (*Goddard v. Merchants' Bank*, 4 Comstock, 149; *Bank of Commerce v. Union Bank*, 3 Id. 234; *Bank of the United States v. Bank of Georgia*, 10 Wheaton, 348; *Price v. Neal*, 3 Burrow, 1355).

Difficulty sometimes arises in determining whether the plaintiff, in an action on a bill of exchange, is the immediate promisee of the defendant, or whether he is to be regarded as a remote party, but it is settled law that the payee, where he discounts the bill at the request of the drawer, is regarded as a stranger to the acceptor in respect to the consideration for the acceptance; consequently, if the acceptance is absolute in its terms and the bill is received in good faith and for value, it is no answer to an action by him that the defendant received no consideration for his acceptance or that the consideration therefor has failed; and it is immaterial in that behalf whether the bill was accepted while in the hands of the drawer and at his request, or whether it had passed into the hands of the payee before acceptance and was accepted at his request. (*Parsons on Bills*, 179; *Munroe v. Bordier*, 8 C. B. 862).

Certain other defences, such as that the payments were voluntarily made, and that the title to the bills at the time the payments were made was in the National Park Bank, were also set up by the defendants, but the court does not find it necessary to examine those matters, as they are of the opinion that the payments if made to the payees of the bills, as contended by the plaintiffs, were made in pursuance of a legal obligation and that the money cannot be recovered back.

Judgment affirmed.

WHEN LIEN ON INSTRUMENT CONSTITUTES HOLDER FOR VALUE.

§ 29.

Stoddard v. Kimball (1850), 6 *Cush.* (Mass.) 469.

O. P. Lord, for the plaintiffs.

N. J. Lord, for the defendant.

SHAW, C.J. This was a suit brought by the plaintiff as indorsee of a promissory note, against the defendant as indorser. The defence relied on was, that the defendant indorsed the note, at the request and for the accommodation of the maker, for a special purpose, that of taking up another note on which he was indorser, and that it was not so applied, but was negotiated to the plaintiffs, as collateral security for a debt due to them. The defendant also contended, that the plaintiffs, at the time of taking the note, had notice of the misapplication of the same, as above stated; but this fact was left to the jury, who found that the plaintiffs had no such notice.

It further appeared, that some payments had been made by the maker of the note to the plaintiffs, towards the discharge of the debt, for securing which to the plaintiffs this note was received, and also that the maker being insolvent, the plaintiffs proved this debt against his estate, and received a dividend.

The defendant contended, that if liable at all, he was liable only for the balance of the debt due the plaintiffs, if less than the amount of the note, and the judge, who tried the cause, so ruled, subject to the opinion of the whole court, and in case they should be of opinion that the plaintiffs are entitled to recover the whole amount, the verdict is to be altered and amended accordingly.

We think the direction was right. An indorser of an accommodation note, passed by indorsement to a *bona fide* holder, in due course of business, is effectually bound to all the liability, to which, by law, the indorser of a business note is liable. He stipulates to take on himself the qualified obligation of one, who indorses and puts in circulation a note taken by himself for value in the course of business.

If indeed an accommodation note is obtained from another, by fraud, deception, or false practices, or having been obtained for one purpose, is fraudulently misapplied to another, and it is negotiated to one, even for value, with full notice of the fraud in obtaining or misusing it, he cannot recover; he is not a *bona fide* holder; an attempt to recover it would make him a partaker in the fraud; and the same would be true of a business note.

In the present case, it appearing that the note was negotiated to the plaintiffs before it was due, for a valuable consideration, and the jury having found that they took it without notice of the misapplication by the maker, it is clear that they have a right to recover; and the only remaining question is, for what amount they may recover. In general, the holder of an indorsed note will be entitled to recover the whole amount of the face of the note, because the presumption of fact, in the absence of counter proof, is, that he gave the full value for it, or that he took it from some other holder for value, to collect the amount, receive a certain part to his own use, and account to the party from whom he took it for the surplus. Having taken it to secure a pre-existing debt, of a less amount, he is a holder for value in his own right, only to the amount of the debt due him. If therefore it appears in proof, that the plaintiff is not accountable to any third person for any surplus, then there is no reason why he should recover any more than the balance of the debt, for which he is a *bona fide* holder for value. Here, it appears that the plaintiff received this note of the maker, for whose accommodation the defendant indorsed it. It being obvious, that the plaintiff can recover nothing as trustee for the party from whom he received it, he is liable over to nobody for the surplus, and therefore can have judgment only for the amount due to himself, for his own use and in his own right, which is so much of the note as may be necessary to satisfy the balance of the debt, for the security of which he received it.

Judgment on the verdict for the plaintiff for the smaller sum.

Redfern et al. v. Rosenthal et al. (1902), 86 L. T. R. 855.

This was an appeal by the defendants from a judgment of the King's Bench Division (Channell and Bucknill, JJ.), affirming a decision of the judge of the Birmingham County Court.

The action was brought against the acceptors of a bill of exchange, dated the 23d June, 1899, for 200*l.*, payable four months after date.

The facts appear in the judgment of the Master of the Rolls.

It may further be added that, on the 7th Oct., 1899, it appeared that the plaintiffs first learnt that the bill was an accommodation bill.

The judgment of the King's Bench Division is reported 85 L. T. Rep. 313.

The Bills of Exchange Act 1882 (45 and 46 Vict. c. 61) provides as follows:

Sect. 27, sub-sect. 3. Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

COLLINS, M.R. This is an appeal from a judgment of the Divisional Court, consisting of Channell and Bucknill, JJ., who affirmed a decision of the judge of the Birmingham County Court, but on different grounds. The transaction which gave rise to the action is somewhat complicated, but the facts are shortly these: Rosenthal Brothers were desirous of raising some money, and for this purpose sent to Bischoffswerder a bill of exchange, dated the 23d June, 1899, payable four months after date accepted by them, and they requested him to fill in his name as drawer, and get the bill discounted for them. Bischoffswerder filled in his name as drawer, indorsed the bill in blank, and handed it to a man named Lewis, who agreed to get it discounted. Lewis then claimed a right to keep the bill, on the ground of Bischoffswerder being in debt to him. The bill in Lewis' hands being a fully negotiable instrument, Bischoffswerder at once in July instructed his solicitors, Messrs. Redfern and Son, who are the plaintiffs in the present action, to commence an action against Lewis in order to stop him from negotiating it, and to get it back from him. An interlocutory injunction was obtained, restraining Lewis until the trial of the action from negotiating the bill. The action came on for trial at Birmingham Assizes in Dec., 1899, so that by that time the bill was overdue. Bischoffswerder obtained a verdict and judgment for the recovery of the bill. At the end of the trial the bill was handed over by Lewis to the managing clerk of Messrs. Redfern and Son. The clerk showed the bill to Bischoffswerder and to Rosenthal Brothers, who were present in court, but after looking at it they handed it back to the clerk, who said that Messrs. Redfern and Son had a right to retain it as they had a lien on it for their costs. The present action was then brought by Messrs. Redfern and Son to recover the amount of their costs in Bischoffswerder's action against Lewis. The action is brought not only against Bischoffswerder, who is clearly liable for the costs, but also against Rosenthal Brothers as acceptors of the bill, for so much of the amount due upon the bill as will satisfy the plaintiffs' claim for costs. The County Court judge held

that Rosenthal Brothers were liable upon the bill, under sect. 27, sub-sect. 3, of the Bills of Exchange Act 1882, and that judgment was affirmed by the King's Bench Division. Rosenthal Brothers have appealed against this decision. Bischoffswerder is no party to the appeal. Now, sect. 27, sub-sect. 3, provides that where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. The plaintiffs' argument was that they were holders of the bill, and as they had a lien on it, they were holders for value, and were therefore entitled to recover in this action. Now, there was some evidence at the trial of the action that Rosenthal Brothers and Bischoffswerder, after some discussion with the plaintiffs' clerk, had handed the bill to him for the purpose of Messrs. Redfern and Son's lien so as to make him holder for value. A controversy arose as to this evidence, and thereupon the plaintiffs said that they did not wish to rely upon that ground, and that they relied solely upon their common law rights of lien and on the Bills of Exchange Act 1882. Now, upon these facts I am of opinion that the plaintiffs have no right of action against Rosenthal Brothers. The bill was handed by Rosenthal Brothers to Bischoffswerder for a specific purpose—namely, to get it discounted—and that purpose failed. When the bill came into the plaintiffs' hands it was overdue. It was not a negotiable instrument. As between the plaintiffs and the defendants the bill never was a living instrument. The plaintiffs when they first got possession of the document as Bischoffswerder's solicitors knew all these facts about it. Yet it was contended that by getting the physical custody of this piece of paper and having done work as solicitors they had acquired the rights of a holder for value under the Bills of Exchange Act 1882 and could sue the acceptors of the bill. It seems to me impossible to say that by getting hold of an overdue bill such as this they became holders for value. The bill should have been re-issued in order to give them any rights upon it. They have misconceived their position. Their rights against the defendants in respect of their lien were no greater than the rights of Bischoffswerder on the bill against the defendants. Bischoffswerder, under the circumstances that I have mentioned, could not, with the plaintiffs' knowledge of the facts, give them any rights on the bill *quâ* bill. The instrument when they received it was dead, and they could not treat it as a living one. That is enough to decide this case. It is not necessary to give any opinion as to what the plaintiffs' rights would have been if

the document had been a living bill. The appeal must therefore be allowed. In the Divisional Court Channel, J., seems to have given judgment with great hesitation, and I think he accepted an inference of fact which was not supported by the evidence. The court seems to have lost sight of the view that at the time when the plaintiffs' supposed lien came into existence, the instrument had, under the circumstances, ceased to be a negotiable instrument.

MATHEW, L.J. I am of the same opinion. It is said that the effect of the judgment in the action by Bischoffswerder against Lewis to restrain the negotiation of the bill was to restore a negotiable character to the bill and give the plaintiffs a right to sue upon it. That would be a very extraordinary result. When the bill was given up it was a security for nothing. It was mere waste paper. It was dead in law, as the plaintiffs must have known. Yet it is contended that the document by being handed to the plaintiffs acquired a new lease of life, and became a negotiable instrument. The plaintiffs obtained no more right against the defendants than Bischoffswerder had; and that was none at all. The only difficulty in the case has been caused by some uncertainty as to what were the actual findings of the County Court judge. I agree that the appeal must be allowed.

COZENS-HARDY, L.J. I am of the same opinion. Many interesting points have been raised, but on the actual facts of the case I see no great difficulty. The solicitors had a lien on their client's interest in the bill, but when they got possession of the bill Bischoffswerder had no rights against the defendants. The document had ceased to be a real bill. It was recovered by Bischoffswerder in his action against Lewis for the very purpose of preventing its being negotiated. The plaintiffs are in no better position than Bischoffswerder, who had no rights on the bill against the defendants. It is unnecessary to give my opinion on what the rights of the plaintiffs might have been if the bill had not been overdue when they got possession of it.

Appeal allowed.

SECTION V.—CONTRACT OF PRIMARY PARTIES.

CONTRACT OF THE MAKER.

§ 62.

Walton v. Mascall (1844), 13 M. & W. 452.

This was an action on an agreement in writing, whereby the defendant in consideration that the plaintiff would accept the promissory note of one Johnson, payable six months after date, for a debt due from Johnson, guarantied and undertook to pay the amount to the plaintiff, provided the note was not duly honoured and paid by Johnson at maturity.

The defendant, being under terms to plead issuably, pleaded a plea denying presentment to Johnson, and a plea denying notice of the dishonour of the note to him the defendant.

POLLOCK, C.B. I am of opinion that the plaintiff is entitled to the judgment of the Court. With respect to the last objection, the declaration shows expressly, not only that the plaintiff did give time by receiving the note, but that he took it under circumstances which compelled him to give time. The case of *Kearslake v. Morgan*, 5 T. R. 513, establishes, that a creditor who receives a negotiable instrument "for and on account of" his debt is taken to have received it in present satisfaction, and the receipt of it operates as a suspension of the remedy upon the debt. As to the other question, it turns a good deal upon what the parties are to be taken to have meant by the words "duly honoured and paid"; and it seems to me that those words, if they be any thing more than mere tautology, must mean, honoured by being paid on the day when the note became due, or paid at any time afterwards. I cannot help thinking that the word "honoured" meant that the note should be presented at any time, and, if paid at any time, then the defendant should be discharged from liability. The real question we have to decide is, whether the averment of a request to pay has a different meaning in a declaration against the maker of a note, and in a declaration against a guarantor for the maker. It seems to me that it means the same thing in both cases; it would lead to much inconvenience to hold the contrary. Now, against the maker of the note, that allegation would be mere form; it must be sufficient to say that he had not paid the sum of money in the note specified according to the tenor and effect thereof.

And if that would be sufficient as against him, it must be equally so against the guarantor. The real contract is, that the makers of the note shall pay it according to its tenor and effect; and it is clear that they are bound to find out the holder and pay him the amount, when the note becomes due. It appears to me, therefore, that a presentment and request are immaterial; and that our judgment must be for the plaintiff.

PARKE, B. I am of the same opinion. The first question which arises in this case is as to the validity of the plea. The declaration is on a guarantie, which states that, in consideration that the plaintiff would receive the promissory note of two persons therein mentioned, and thereby give time for the payment of a debt due from one of those persons, the defendant promised to pay the plaintiff the amount of the debt, if the note were not "duly honoured and paid." The declaration then avers, that, before the commencement of the suit, the note became due and payable according to its tenor and effect, and that the makers, although requested so to do, have not paid it, of which the defendant had notice. The plea traverses the allegation of the request to pay; and to that there is a general demurrer. Now, it is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made: if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due. It is clear, therefore, that the defendant was bound to pay the amount of the promissory note when it had become due and was dishonoured, unless there was some condition precedent to be performed by the plaintiff, which has not been performed. It is argued, that this condition precedent is that the note shall be presented for payment when due. But it seems to me that the words "duly honoured and paid" are merely tautologous, and mean simply that the note shall be paid when it becomes due. What I am reported to have said in the case of *Lewis v. Gompertz*, when taken in connexion with the facts of that case, I hold to be perfectly correct. There can be no doubt that a mercantile man, reading the notice of dishonour which was given in that case, would necessarily infer that the bill had been duly presented for payment when it became due. But no request or presentment is necessary to charge the acceptor of a bill or the maker of a note; he is bound to pay it at maturity, and to find out the holder for that purpose. Upon this contract of guarantie, therefore, it seems to me that the word "honoured" means no more than the words "duly paid," and that, inasmuch as this note has not been paid,

the defendant is chargeable. With respect to the other point, the giving of a negotiable security for and on account of a debt operates *prima facie* to suspend payment of the debt until it becomes due. I think the declaration is perfectly sufficient, and that the plaintiff is entitled to judgment.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

Gumz v. Giegling (1896), 108 Mich. 295.

Error to Manistee. McMahon, J.

Assumpsit by Rudolph Gumz and others, as copartners, doing business under the firm name of R. Gumz & Co., against Henry J. Giegling and Cornelius A. Waal, on a promissory note. From a judgment for plaintiffs on verdict directed by the court, defendant Waal brings error. Affirmed.

This suit was brought upon a promissory note for \$700 dated August 14, 1893, payable to the order of R. Gumz & Co., one year from date, indorsed by defendant Waal. The defendant Waal pleaded the general issue, with notice that the note was given for a prior indebtedness of defendant Giegling; that Waal, when applied to by plaintiffs to indorse the note, refused to do so, and was induced to indorse the same on the representation of plaintiffs that his signature was to be a matter of form, and not for the purpose of creating any liability on his part, but was to be used only to enable them to have an additional argument and lever to use upon Giegling to induce him to pay the note; and that plaintiffs promised that no claim or demand should be made on him for payment, and that his signature should not be considered as creating any liability. At the conclusion of the proofs, the court directed a verdict in plaintiffs' favor.

George L. Hilliker, for appellant.

Dovel & Smith, for appellees.

GRANT, J. (after stating the facts). Plaintiffs had sold meat to defendant Giegling, who kept a meat shop in Manistee. The account was an open one, and had been running between four and five months previous to the date of the note. They refused to sell him any more goods unless the account was paid or secured. Giegling was unable to pay, and Mr. Schaaf, plaintiffs' agent,

asked him to give a note with an indorsement. Mr. Giegling suggested that they see defendant Waal, and that he might indorse a note for him. The two went together to Mr. Waal's office. Mr. Waal gave evidence to sustain the facts set up in his notice. It, however, conclusively appears from his own testimony, as well as that of Mr. Schaaf and Mr. Giegling, that all the conversation upon which he relies as a defense occurred before the note was made out and signed. It is therefore sought to vary the terms of a plain written contract by parol evidence of what took place before its execution. Mr. Waal himself testified, "After the talk was had all around, we all came in there; and the note was drawn up and signed at once, and handed over to Mr. Schaaf." Time for the payment was extended one year. Giegling told Mr. Waal that, if plaintiffs got this note, they would sell him more meat.

Waal was not the payee upon the note, and indorsed it before it was uttered, and before the payee had indorsed it. He is therefore a joint maker. *Rothschild v. Grix*, 31 Mich. 150. If the note had been executed by Giegling, and delivered to plaintiffs, and they had afterwards secured the indorsement of Waal, without consideration, this defense would have been open to him, under the authority of *Kulenkamp v. Groff*, 71 Mich. 675. That decision, however, expressly holds that under the facts of this case the defense cannot be sustained. See, also, *Aultman & Taylor Co. v. Gorham*, 87 Mich. 233.

The learned circuit judge was correct in directing a verdict for plaintiffs.

The other Justices concurred.

The judgment is affirmed.

ADMISSIONS OF THE MAKER.

§ 62.

Wohlke et al. v. Kuhne (1886), 109 Ind. 313.

From the Allen Superior Court.

W. G. Colerick, H. Colerick, W. S. Oppenheimer and *P. B. Colerick*, for appellants.

T. E. Ellison, for appellee.

ELLIOTT, C.J. Wohlke, as principal, and Trentman, as surety, executed the promissory note in suit, payable to the order of "T. W. Woollen, Attorney General."

There is evidence very satisfactorily showing that Kuhne became the owner of the note in good faith, for value, and without notice of any defence, before its maturity.

We incline to the opinion that the words added to the name of the payee are merely descriptive of the person, and can not, in any event, trammel the rights of a *bona fide* holder. *Jackson School Tp v. Farlow*, 75 Ind. 118; *Hayes v. Matthews*, 63 Ind. 412; *Hays v. Crutcher*, 54 Ind. 260; *Means v. Swormstedt*, 32 Ind. 87 (2 Am. R. 330); *Kenyon v. Williams*, 19 Ind. 44; *Hobbs v. Cowden*, 20 Ind. 310; *Shepherd v. Evans*, 9 Ind. 260.

We are clearly of the opinion that the appellants are not in a situation to dispute the authority of the payee to accept and transfer the note executed by them. Whatever may be the right of the State, it is certain these appellants can not successfully present the question of the authority of T. W. Woollen to take or transfer the note executed to him. That is a question between him and the State, with which these appellants have no concern, for they have executed a commercial note, fair on its face and complete in all its parts, and they can not defeat it in the hands of a *bona fide* holder. *New v. Walker*, 108 Ind. 365.

The makers of a note negotiable under the law merchant warrant the capacity of the payee to transfer it in the usual course of business. Mr. Bigelow thus states the rule: "The execution of a negotiable note is a warranty of the *existing* capacity of the payee to endorse the paper." Bigelow Estop. 512. Another author says: "The person to whose order a bill or note is made payable, is generally vested with the right to transfer the same by endorsement; and it does not lie with the maker or acceptor to dispute the power of the payee to endorse and transfer the instrument. By making the note or accepting the bill, and issuing it, the maker and acceptor assert to the world the competency of the payee to negotiate and assign the paper; and they are not afterwards permitted to gainsay the assertion so made." Edwards Bills and Notes, section 363. An English author, whose work has long been recognized as authority, in speaking of the acceptor of a bill, says: "He moreover admits, and so does the maker of a promissory note, the then capacity of the payee, to whose order the bill or note is made payable, to endorse." Byles Bills, 202.

This well established principle rules the case against the appellants. The decision in *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464, expresses the law correctly upon the case then before the court, but it has no application to such a case as this.

supposed to have been the doctrine of former cases, that debt would lie by the payee of a note against the maker, where the note was expressed to be for value received. That decision was given with measured caution, and the court expressly declined to give any opinion upon any but the case in judgment. The case in *Hardres* was there discussed, and although its reasoning was not impugned, an authoritative weight was not attempted to be given to it. In general, the legal predicament of the maker of a note is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill in the first instance; and after indorsement, each bears the same liabilities. And if an action of debt will lie in favor of the payee of a note against the maker, it is not easy to perceive any sound principle upon which it ought to be denied against an acceptor of a bill. The acceptance of a bill is just as much an admission of a debt between the immediate parties as the drawing of a note.

The case has been thus far considered as if the action were brought by the payee against the acceptor. And this certainly presents the strongest view in favor of the argument. But in point of law every subsequent holder, in respect to the acceptor of a bill, and the maker of a note, stands in the same predicament as the payee. An acceptance is as much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee. (3 T. R. 172; *Id.*, 184, *Grant v. Vaughan*, 3 Burr. 1515.)

Upon the whole, we do not think that the authority in *Hardres* can be sustained upon principle; and we see no inconvenience in adopting a rule more consonant to the just right of the parties as recognized in modern times. In so doing, we apply the well-settled doctrine that debt lies in every case where the common law creates a duty for the payment of money, and in every case where there is an express contract for the payment of money. We are therefore of opinion that debt lies upon a bill of exchange by an indorsee of the bill against the acceptor, when it is expressed to be for value received. The case at bar is somewhat stronger; for the declaration expressly avers that the bill was drawn, indorsed, and accepted for value received, and the demurrer admits the truth of the averment.

This opinion must be certified to the Circuit Court for the District of Columbia.

From the view which has been taken of the case it is unnecessary to consider whether the statute of Virginia applies to it or not.

Certificate accordingly.

*Fort Dearborn Nat. Bank v. Carter, etc., Co. (1890), 152
Mass. 34.*

Contract against the acceptor of a bill of exchange for \$625. Trial in the Superior Court, without a jury, before Mason, J., who allowed a bill of exceptions in substance as follows:

The plaintiff is a national bank, having its usual place of business in Chicago, where also the Clark & Longley Company, an Illinois corporation, has its usual place of business. The defendant is a Massachusetts corporation, having its place of business in Boston. Before January 1, 1889, the defendant had sold merchandise to the Clark & Longley Company, and on January 17, 1889, the Clark & Longley Company was indebted to the defendant in the sum of about \$1,400, for merchandise previously sold and delivered. On January 10, 1889, the Clark & Longley Company wrote, requesting the defendant to accept a draft for its accommodation, which request the defendant refused. On January 17, the Clark & Longley Company again wrote to the defendant, saying that it had been obliged to pay unusually heavy bills for the months of November and December; that it regretted that it had been obliged to make drafts upon the defendant so frequently of late; that its collections had been slow, but were much easier; that it would not need to trouble the defendant after that day; and requested the acceptance of a draft for \$625 for its accommodation, which it had drawn upon the defendant. The defendant had within a short time previously accepted and paid several accommodation drafts for the Clark & Longley Company, which, like this, had been discounted before acceptance.

The Clark & Longley Company presented this draft for \$625 to the plaintiff, in Chicago, on January 17; and the plaintiff placed the amount of the draft, less the discount thereof, to its credit. The amount thereof was on the same day drawn out by check by the Clark & Longley Company; and the draft was forwarded, through the Freeman's National Bank of Boston, for acceptance and collection. The draft was presented to the defendant for acceptance on January 19, at its place of business, and about 3 o'clock P. M. on January 21 the defendant accepted the draft, dating the acceptance January 19, 1889, and relying upon the representations contained in the letter of the Clark & Longley Company of January 17, 1889. After 4 o'clock P. M. of January 21, the Clark & Longley Company suspended, and confessed judgment to the plaintiff in the sum of \$22,000, which was

intended to cover certain indebtedness from the Clark & Longley Company to the plaintiff, but did not cover all of the plaintiff's claims, and did not cover the draft for \$625. On the same day an execution issued upon this judgment, and the plaintiff levied upon the property of the Clark & Longley Company. On the morning of January 22 the defendant first learned by telegram from Chicago that the Clark & Longley Company had suspended, and had confessed judgment to the plaintiff. The treasurer of the defendant corporation at once went to the Freeman's National Bank, where the draft was then held awaiting collection at maturity, and asked the cashier to be permitted to cancel and withdraw the defendant's acceptance of the draft. The cashier of the bank refused to permit the treasurer to cancel and withdraw the acceptance, but at his request telegraphed to the plaintiff that, although the draft had been accepted, it would not be paid at maturity. This telegram was the first intimation the plaintiff had received that the draft had been accepted, and it made no advance to the Clark & Longley Company on account of the draft after it had been forwarded to the Freeman's National Bank. The defendant had never promised either the Clark & Longley Company or the plaintiff to accept this draft. The plaintiff did not know that it was to be an accommodation acceptance, but believed that the draft was a just claim of the Clark & Longley Company against the defendant.

The defendant requested the judge to rule as follows:

"1. Upon the evidence in this case, there was no consideration for the defendant's acceptance of the draft declared on.

"2. The plaintiff's action cannot be maintained unless there was a valuable consideration for the defendant's acceptance.

"3. If the defendant accepted the draft without consideration and for the accommodation of the drawer, and relying on the drawer's representation that it was solvent and its affairs prosperous, and in ignorance of the fact that the drawer was insolvent, and had after the draft was drawn and before presentment confessed judgment to the plaintiff, the defendant could revoke its acceptance, unless the plaintiff had after the acceptance and before notice of the defendant's revocation made an advance on the draft to the drawer.

"4. The defendant could revoke its acceptance at any time before notice of its acceptance had been given to the plaintiff."

The judge refused so to rule in terms, but ruled as follows:

"1. Upon the evidence, there was no consideration as between the drawer and drawee, and no new consideration as between

the plaintiff and any party to the bill at or subsequent to the acceptance, but prior to and at the time of the acceptance the plaintiff was a *bona fide* holder for value, and want of consideration as between drawer and drawee does not prevent its recovery.

"2. The defendant could revoke its acceptance at any time before the communication of such acceptance to the plaintiff or to the plaintiff's agent, but could not revoke the acceptance after delivering the same to the Freeman's National Bank, the agent of the holder."

The judge found for the plaintiff; and the defendant alleged exceptions.

W. B. French, for the defendant.

W. A. Knowlton, for the plaintiff.

FIELD, J. It is clear that the first ruling made by the court is correct, and that the first and second rulings requested were rightly refused. (*Arpin v. Owens*, 140 Mass. 144; *Heuertemette v. Morris*, 101 N. Y. 63.)

When the draft with the defendant's acceptance upon it was delivered by the defendant to the Freeman's National Bank, which was the agent of the plaintiff, the contract of acceptance between the plaintiff and the defendant became complete, and the acceptance could not after that be revoked unless the defendant had the right to rescind the contract. The second ruling, therefore, is correct, and the fourth ruling requested was rightly refused, if these rulings relate to the revocation as distinguished from a rescission.

The third ruling requested suggests that possibly the defendant's counsel had it in mind to contend that the letter of the 17th of January from the Clark & Longley Company to the defendant corporation, upon which it relied in accepting the draft, contained a representation that the company was solvent; that this representation was false; and that therefore, when the defendant discovered that the representation was false, it had the right to rescind the contract of acceptance, unless the plaintiff had after the acceptance "made an advance on the draft to the drawer." Although the Clark & Longley Company suspended payment on the 21st of January, the exceptions do not state that the company was not solvent on the 17th of January, and it is doubtful if the letter can be construed as containing any positive representation of solvency, assuming that its contents are correctly stated in the bill of exceptions. This third request, more-

over, does not distinctly assume that the defendant was deceived by any representations which the drawer made, and was thereby induced to accept the draft. We have some doubt whether the judge, who tried the case without a jury, understood that any question of law was raised concerning the right of the defendant to rescind the contract of acceptance on account of any fraudulent misrepresentations of the drawer of the draft; still we will consider the question.

Whatever may be the distinction between such a case as the *Merchants' National Bank v. National Bank of the Commonwealth*, 139 Mass. 513, and the case of *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397, it is manifest that the making of a contract, or the payment of money under a mistake of fact, as these words are used in the law, is not always followed by the same consequences as the making of a contract, or the payment of money, by reason of the fraudulent misrepresentations of a third person. Certainly the general rule is, that a contract made between two persons on a valuable consideration cannot be rescinded by one of the parties on the ground that a third person, at whose request the party entered into the contract, made fraudulent misrepresentations to him on which he relied, if this third person was not an agent of the other party, and the other party had no knowledge of the fraud. See *Fairbanks v. Snow*, 145 Mass. 153. The contract of acceptance was made by the defendant with the plaintiff on what the law considers a valuable consideration; namely, the consideration paid by the plaintiff to the Clark & Longley Company in anticipation of the acceptance. The Clark & Longley Company in inducing the defendant to accept the draft acted on its own account and for its own benefit, and the plaintiff is innocent of any knowledge of or participation in any fraud of that company. There are practical reasons of great weight why the rule we have stated should be applied to negotiable paper. Acceptors of bills of exchange should not be permitted to vary their liability from that which is apparent on the face of the bills, by setting up against *bona fide* holders for value, who took the bills before maturity, statements made by the drawers to the drawees whereby they were induced to accept the bills; and we have been unable to find that any distinction has been taken in this respect between holders of bills who took them before acceptance and those who took them afterwards.

Exceptions overruled.

Tucker Mfg. Co. v. Fairbanks et al. (1867), 98 Mass. 101.
See also § 22.

Contract against David Fairbanks & Co. as drawers of the following bill of exchange:

"\$4,469.76. "BOSTON, March 23, 1866.
"Two months after date pay to the order of Messrs. Hiram Tucker & Co. four thousand four hundred and sixty-nine 76/100 dollars, value received, and charge the same to the account of
"DAVID FAIRBANKS & Co.,
"Agts. Piscataqua F. & M. Ins. Co.
"To Piscataqua F. & M. Ins. Co., So. Berwick, Me."

Across the face of the draft was written, "Accepted for the Treasurer, David Fairbanks, President;" and on the back, "Payable in Boston, Hiram Tucker & Co."

Trial by jury was waived, and the case heard by Foster, J., who found the following facts: The signatures of all the parties to the bill were proved or admitted. It was actually made and delivered to the officers of the plaintiff corporation, and accepted by them on the 3d of April, 1866, in payment and satisfaction of the amount of a loss by fire, due on a policy of insurance effected by Hiram Tucker & Co. in the Piscataqua Fire and Marine Insurance Company, which had been ascertained on the 23d of March, and was payable sixty days afterwards, and had been assigned by Hiram Tucker & Co. to the plaintiffs on the 26th of March. The plaintiffs had full knowledge of all the circumstances under which the bill was made. The insurance company, at the time of delivering it, took from the plaintiffs' treasurer this receipt:

"Piscataqua Fire and Marine Ins. Co.,
"Treasurer's Office,
"\$4,469.76. "SO. BERWICK, ME., April 3, 1866.
"Received of the Piscataqua Fire and Marine Insurance Company forty-four hundred and sixty-nine and 76/100 dollars, in full for loss and damage to my property by fire on the 19th of March, 1866, insured by policy No. 16,907 in said company.
"TUCKER MANUFACTURING CO.
"R. S. FAY, Treas."

No evidence was offered of any fraud attending the making of the bill. The defendants offered parol evidence tending to

show that it was not expected or intended that they should be liable on the bill, that it was given only to settle the loss, and was supposed and expected by both parties to create a debt against no one but the insurance company. But the judge excluded such evidence, and held that the question of the defendants' liability must be determined by the instrument itself.

The insurance company were a corporation established by the laws of Maine, having their office at South Berwick in that state. The bill was never presented to them there for acceptance, and no regular notice of its nonpayment was given to the defendants. The defendants had no funds in the hands of the insurance company when the bill was made or ever afterwards. It was proved that the draft was made and delivered in Boston at the office of the defendants, who were the general agents of the insurance company, and one of them, David Fairbanks, its president, and the agent appointed to receive service of process in Massachusetts, under the Gen. Sts. c. 58, § 68; that at the time of its execution one of the defendants was asked where it would be paid, and replied "in Boston," and requested the plaintiff to keep it there and not send it to Maine for collection; that before it came due one of the defendants told the plaintiff that it would not be paid at maturity, but he hoped it would be paid eventually; that on the last day of grace the defendants were informed by the plaintiff that it was in the Union Bank in Boston, and one of them answered that it would not be paid.

Upon these facts the presiding judge found that due presentment and notice had been waived by the defendants; and reserved the questions, whether the facts warranted this finding, whether the defendants were liable personally as drawers on the face of the bill, and whether the parol evidence offered by them should have been received, for the consideration of the full court, according to whose opinion judgment was to be entered for the plaintiff, or for the defendant, or a new trial ordered.

C. Browne, for the plaintiffs.

H. A. Scudder, for the defendants.

GRAY, J. 1. The facts proved at the trial were amply sufficient to warrant the finding that presentment for acceptance and notice of nonpayment had been waived. The defendants knew that the bill would not be paid at maturity, and so informed the plaintiffs; and the plaintiffs had the right to rely upon the information so received and omit a useless ceremony which could be of no benefit to themselves or to the defendants. (*Brett v.*

Levett, 13 East, 213; *Barker v. Parker*, 6 Pick. 80; *Spencer v. Harvey*, 17 Wend. 489.)

2. It is equally clear that the liability of the defendants as drawers of a negotiable instrument must be determined from the instrument itself. This is too well settled to admit of discussion. There is no distinction in this respect between the drawer of a bill of exchange and the maker of a promissory note. (*Bank of British North America v. Hooper*, 5 Gray, 567; *Bass v. O'Brien*, 12 Gray, 481; *Slawson v. Loring*, 5 Allen, 342; *Barlow v. Congregational Society in Lee*, 8 Allen, 460; *Arnold v. Sprague*, 34 Verm. 402; Met. Con. 108.)

3. The question whether the defendants are liable upon the face of the bill requires more consideration. The difficulty is not in ascertaining the general principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. Amid the great variety of language which may be used by merchants in haste or thoughtlessness, ignorant or unmindful of legal rules, or not anticipating the importance of holding one party rather than the other responsible, it must often happen that cases fall very near the dividing line; and, in order to maintain uniformity of decision, it is necessary for the court to refer to the cases already adjudicated, especially within its own jurisdiction.

The authority which at first sight seems most strongly to support the position of the defendants is that of *Ballou v. Talbot*, 16 Mass. 461, in which a note signed "Joseph Talbot, agent for David Perry," was held not to bind Talbot personally. That case has since been recognized and followed in this Commonwealth. (*Jefts v. York*, 4 Cush. 372; *Page v. Wight*, 14 Allen, 182.) But the important and effective word in *Ballou v. Talbot* was not the word "agent," nor the name of the principal, but the connecting word "for," which might indeed indicate merely the

relation which the agent held to the principal; but which was equally apt to express the fact that the act was done in behalf of the principal, in the same manner as if the words had been transposed thus: "For David Perry, Joseph Talbot, agent." (See *Deslandes v. Gregory*, 2 El. & El. 602.) This is made manifest by considering that if the word "agent" had been wholly omitted, and the form of the signature had been simply "Joseph Talbot, for David Perry," or "For David Perry, Joseph Talbot," it would have been well executed as the contract of the principal, even if it had been under seal, and of course not less so in the case of a simple contract. (*Long v. Colburn*, 11 Mass. 97; *Emerson v. Providence Hat Manufacturing Co.*, 12 Mass. 237; *Mussey v. Scott*, 7 Cush. 215; Met. Con. 105, 110.)

On the other hand, in *Hills v. Bannister*, 8 Cowen, 31, a note signed by two persons, with the addition "Trustees of Union Religious Society, Phelps," (Who were a legal corporation,) was held to bind the signers personally; and in *Barker v. Mechanic Insurance Co.*, 3 Wend. 94, a note signed "John Franklin, President of the Mechanic Fire Insurance Company," was held on demurrer not to be the note of the company, although alleged to have been made within the authority of the president and the scope of the legitimate business of the corporation; the court saying: "In this case, there is an averment that the president was lawfully authorized; but it does not appear that he acted under that authority; he does not say that he signs *for the company*; he describes himself as president of the company, but to conclude the company by his acts he should have contracted in their name, or at least on their behalf." The variation between the words "for" and "of" seems at first view slight; but in the connection in which they are used in signatures of this kind the difference is substantial. "Agent of" or "president of" a corporation named simply designates a personal relation of the individual to the corporation. "Agent for" a particular person or corporation may designate either the general relation which the person signing holds to another party, or that the particular act in question is done in behalf of and as the very contract of that other; and the court, if such is manifestly the intention of the parties, may construe the words in the latter sense. But even "agent for" has been held under some circumstances a mere *descriptio personæ* of the agent, as in *De Witt v. Walton*, 5 Selden, 570, in which the name following these words was not the proper name of the principal, but the name of a newspaper which the agent carried on in the principal's

behalf, and a note signed "David Hoyt, agent for The Churchman," was held to be the note of Hoyt and not of his principal; and in *Shattuck v. Eastman*, 12 Allen, 369, in which it was held that a paper in the form of a receipt, signed "Robert Eastman, Agent for Ward 6, Lowell, Mass.," if executed under such circumstances as to amount to a contract, might be binding on the agent personally. In *Fiske v. Eldridge*, 12 Gray, 474, in a careful review of the cases by Mr. Justice Dewey, the New York decisions above mentioned were quoted with approval, and a note signed "John T. Eldridge, Trustee of Sullivan Railroad," was held to be the personal note of Eldridge. In *Haverhill Insurance Co. v. Newhall*, 1 Allen, 130, a note signed "Cheever Newhall, President of the Dorchester Avenue Railroad Company," was held to bind Newhall personally, although given by him to an insurance company (as was expressed in the note itself) in consideration of a policy issued to the railroad corporation, which he was in fact authorized to obtain and sign the note for. See also *Fullam v. West Brookfield*, 9 Allen, 1; *Morrell v. Coddington*, 4 Allen, 403; *Tanner v. Christian*, 4 El. & Bl. 591; *Parker v. Winslow*, 7 El. & Bl. 942; *Price v. Taylor*, 5 H. & N. 540; *Bottomley v. Fisher*, 1 H. & C. 211.

This case is not distinguishable from those just stated. It differs from *Ballou v. Talbot*, in omitting the word "for," (the only evidence, contained in the note there sued on, that it was made in behalf of the principal) leaving the words "Agts. Piscataqua F. & M. Ins. Co." as a mere description of the persons signing this bill. The cases of *Mann v. Chandler*, 9 Mass. 335, *Despatch Line of Packets v. Bellamy Manufacturing Co.*, 12 N. H. 205, and *Johnson v. Smith*, 21 Conn. 627, cannot avail the defendants against the latter decisions of this court. See 12 Gray, 476; 8 Allen, 461, 462. The name of the principal does not appear in the body of the bill. The address of the bill to the corporation and the request to them to charge the amount to the account of the drawers have certainly no tendency to show that the drawers are the same as the corporation, the drawees. The fact that the bill was delivered to the plaintiffs by the insurance company, as shown by the contemporaneous receipt, does not make it the less the promise of the signers. The defendants must therefore be held personally responsible as the drawers of the bill.

Judgment for the plaintiffs.

ADMISSIONS OF THE ACCEPTOR.

§ 64—I.

Nat. Park Bank v. Ninth Nat. Bank; Same v. Fourth Nat. Bank
(1871), 46 N. Y. 77, 7 Am. Rep. 310.

The first case is an appeal from judgment of the late General Term, of the first judicial district, reversing order of Special Term sustaining demurrer to complaint, and also judgment entered upon said order.

The last is an appeal from judgment of General Term; New York Common Pleas, affirming judgment of Special Term of that court overruling demurrer to complaint.

The complaint in the first case states in substance, that on the 25th March, 1867, the Ridgely National Bank, of Springfield, Illinois, drew its draft, or bill of exchange on plaintiff, for the sum of fourteen dollars and twenty cents, payable to the order of Ely Shirly, and delivered the same to the payee. That afterward the amount of said draft was fraudulently changed to \$6,300.00, and the name of the payee to E. G. Fanchon, Esq. That the name of Wm. Ridgely, cashier, signed to said draft was erased, and afterward re-written by the person making the erasure. That the same was then discounted by the Lexington National Bank, and by it was endorsed to defendant. That afterward, and on or about April 12th, 1867, defendant presented said draft to plaintiff, and said plaintiff paid thereon the sum of \$6,300. That plaintiff discovered the forgery May 10th, 1867, and forthwith notified defendant thereof, and demanded re-payment of said sum, less fourteen dollars and twenty cents, which was refused. Defendant demurs, "that the complaint does not state facts sufficient to constitute a cause of action."

In the last case the facts are similar, save as to amount and names.

J. H. V. Arnold, for appellant, Ninth Nat. Bank.

S. K. Miller, for appellant, Fourth Nat. Bank.

F. C. Barlow, for respondent.

ALLEN, J. The checks paid by the plaintiffs, the drawees, were forgeries throughout, as well the signatures, as the bodies.

The name of the signer, the cashier of the Ridgely Bank, was not the genuine signature of that officer, and was not written by his authority. The fact that a genuine check had been drawn, and signed by the proper party, upon the same piece of paper, does not affect the character of the instrument in its altered, and

forged condition. The forger, by skillfully obliterating the genuine signature, together with the words and figures indicating the amount payable thereon, effectually destroyed the instrument, and it was incapable of being restored to its original condition, in the form of a check, and made available for any purpose.

It was but a blank form of a draft or bill, and the act of signing the name of the cashier as drawer, with intent to utter and pass the same as genuine, was a crime, and the signature a forgery, whether the check was for the same, or a different amount from that for which the original and genuine bill had been drawn.

Whether the forger used the same paper on which the original instrument had been written and signed, and manipulated it to suit his purposes, or made and forged a check on another, and different piece of paper is not material, so long as the signature of the drawer was counterfeit.

The drafts paid by the plaintiff were not merely raised checks, that is, forged and altered by the obliteration and removal of one sum, and the insertion of another, but were forged instruments in every sense.

The drafts signed by the cashier are not in existence in any form as drafts. The genuine signature was wanting, to make the instruments the checks of the nominal drawer, for any amount. The money was then paid by the plaintiff upon bills drawn upon it, to which the name of its correspondent had been forged.

For more than a century it has been held and decided, without question, that it is incumbent upon the drawee of a bill, to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid.

The doctrine was broached by Lord Raymond in *Jenys v. Fowler* (2 Strange, 946), the chief justice strongly inclining to the opinion, that even actual proof of forgery of the name of the drawer, would not excuse the defendants against their acceptance. In 1762 the principle was flatly, and distinctly decided by the Court of King's Bench, in the leading case of *Price v. Neal* (3 Burrows, 1354), which was an action to recover money, paid by the drawee to the holder of a forged bill. Lord Mansfield stopped the counsel for the defendant, saying that it was one of those cases that never could be made plainer by argument; that it was incumbent on the plaintiff, to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted and paid it,

but it was not incumbent for the defendant to inquire into it. This case has been followed and the doctrine applied, almost without question or criticism, in an unbroken series of cases, from that time to this, and it has been distinctly approved in very many cases, which have not been within the precise range of the principle decided. (See *Archer v. Bank of England*, 2 Doug., 639; *Smith v. Mercer*, 6 Taunt., 76; *Wilkinson v. Johnson*, 3 B. & C., 428; *Cook v. Masterman*, 7 B. & C., 902; *Cooper v. Meyer*, 10 B. & C., 468; *Saunderson v. Coleman*, 4 M. & G., 209; *Smith v. Chester*, 1 D. & E. R., 655; *Bass v. Clive*, 4 M. & S., 15; *Bank of Commerce v. Union Bank*, 3 Comstock, 230; *Goddard v. Merchants' Bank*, 4 Comstock, 149; *Canal Bank v. Bank of Albany*, 1 Hill, 287.)

Cases have been distinguished from *Price v. Neal*, and its applicability to a transfer to a forged instrument, between persons not a party to it, has not been extended to forgeries of indorsements or handwriting of parties to negotiable instruments, other than the drawer. But, as applied to the case of a bill to which the signature of a drawer is forged, accepted or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterward paid. (*Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Vermont, 141; *Levy v. Bank of the U. S.*, 4 Dallas, 234; *Bank of U. S. v. Bank of Georgia*, 10 Wheat., 333; *Young v. Adams*, 6 Mass., 182; *Gloucester Bank v. Bank of Salem*, 17 Mass. 41.)

A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded.

It has become a rule of right and of action among commercial and business men, and any interference with it would be mischievous. Judge Ruggles in *Goddard v. Merchants' Bank*, *supra*, well says, "it should not be departed from, or frittered away by exceptions resting on slight grounds, and cannot be overruled, without overthrowing valuable, and well settled principles of commercial law." In the first above entitled action, the judgment of the General Term should be reversed, and that of Special Term affirmed, and judgment absolute for the defendant with costs; and in the other, the Judgment of the General and Special Term should be reversed, and judgment for the defendant with costs.

All concur.

PECKAM, J., not voting.

Judgment accordingly.

First Nat. Bank v. Northwestern Bank (1894), 152 Ill. 296.

Appeal from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

The bank checks involved in this suit purported to be drawn by the Central Union Telephone Company upon the Northwestern National Bank of Chicago. Four of these checks were made payable to the order of "F. P. Ross, Manager," and one was drawn payable to the order of "C. H. Wilson, A. G., Supt." These checks were received by appellant, the First National Bank, in the regular course of business, being deposited with it by Chapin & Gore, who were regular depositors. Appellant endorsed them, "Pay through Chicago Clearing House only to First National Bank," and they being by the clearing house presented to appellee, were paid by it. Afterwards, it was discovered that the signatures of the maker, the telephone company, and that of the payees, Wilson and Ross, were forgeries. Thereupon the Northwestern National Bank brought this suit against the First National Bank. The other important facts are stated in the opinion.

Messrs. Remy & Mann, for the appellant.

Mr. Charles M. Sturges, for the appellee.

Mr. JUSTICE BAKER delivered the opinion of the court:

In this action of assumpsit brought by the Northwestern National Bank of Chicago, against the First National Bank of Chicago, the issues were tried before the Superior Court of Cook county without a jury, and the court found the issues for the plaintiff, and assessed its damages at \$2,454, and rendered judgment therefor against the defendant. Upon an appeal to the Appellate Court for the First District the judgment was in all things affirmed, and thereupon the First National Bank of Chicago prosecuted this further appeal.

(Omitting questions of practice).

It may be well, in order to clearly understand the nature of the case upon which appellee relies, to briefly state the substance of its declaration. The declaration contains ten counts, nine of which are special, and each of these special counts describes a different instrument in writing, and the tenth count is a common *indebitatus assumpsit* count for interest. The first count avers

that on May 17, 1887, "a certain person" made and drew, by and under the name and style of "W. S. Chapman, Treas.," a certain draft or order, in writing, for the payment of money, commonly called a check on a bank, with the heading "Central Union Telephone Company," and said check being numbered with the number 13,006, and caused said check to be countersigned by and under the style of "Geo. L. Phillips, Prest.," and directed said check to the appellee, and thereby requested it to pay \$300 to C. H. Wilson, who was described therein as "C. H. Wilson, A. G. Supt.," and that afterwards some one to plaintiff unknown, intending to defraud C. H. Wilson, and without the consent, knowledge or ratification of Wilson, and without the knowledge of plaintiff, forged on said check the name of "C. H. Wilson, A. G. Supt.," and caused said check, so indorsed, to be placed in the hands of Chapin & Gore, who in turn endorsed it "For deposit in the First National Bank to the credit of Chapin & Gore," and delivered it to the appellant, who in turn endorsed it "Pay through Chicago Clearing House only to First National Bank," and through said clearing house presented said check to appellee for payment, and thereby vouched and warranted to appellee that the endorsement of C. H. Wilson on said check was the genuine endorsement of said Wilson, and that appellee, confiding in said warranty of appellant, and in consideration thereof, and being ignorant that said endorsement was forged, paid said check to appellant and took up the check; that appellee did not discover the fact of such forgery until July 25, 1887, when it notified appellant, tendered to it the check, and demanded that appellant should make good its warranty, and should repay to appellee the amount of the check, by means whereof appellant became liable to pay, promised to pay, and afterwards refused, etc. The averments of the second count are substantially the same as those of the first count, except that the check is dated May 31, 1887, is numbered 13,051, and is for \$250. The averments of the third count are substantially the same as those of the first count, except that the check is dated June 13, 1887, is numbered 13,086, and is for \$200. The averments of the fourth count are substantially the same as those of the first count, except that the check is dated June 13, 1887, is numbered 13,087, and is for \$200, and except, further, that the count contains the additional averment that on June 30, 1887, appellee accepted said check and wrote on the face thereof these words: "Accepted payable through Chicago Clearing House, June 30, 1887.—Northwestern National Bank.—Sheahan, Teller." The averments of the fifth count are substantially the same as

those of the first count, except that the check is dated July 5, 1887, is numbered 13,145, and is for \$200, and except, also, that there is no averment that it is countersigned by and under the style of "Geo. L. Phillips, Prest." The averments of the sixth count are substantially the same as those of the first count, except that the payee named in the check is "F. P. Ross, M'gr.," and except that the check is dated May 31, 1887, is numbered 13,049, and is for \$200. The seventh count is the same as the sixth count, except that date of check is May 1, 1887, and its number is 13,050, and it is for \$300.10. The eighth count is the same as the sixth count, except that date of check is June 18, 1887, and its number is 13,085, and it is for \$200. The ninth count is the same as the sixth count, except that date of check is July 5, 1887, and its number is 13,147, and its amount is \$200, and except, also, that it contains an additional averment that on July 13, 1887, appellee accepted said check, and wrote on the face thereof: "Accepted payable through Chicago Clearing House July 13, 1887.—Northwestern Nat'l Bank.—Sheahan, Teller."

The only plea filed to the declaration was that of the general issue, and issue was joined thereon. But at the trial a stipulation was made that appellant might, under that plea, introduce evidence to prove that the checks were otherwise forged, prior or in addition to the endorsements alleged to have been forged, and that such prior and other forgeries were on said checks when they came to the hands of appellant, and without its knowledge, provided the court should hold proof of such matter competent as a defense, and provided appellee might introduce, in reply, all matters in evidence, and provided the rulings of the court admitting or rejecting such evidence should be subject to exception by either party, other than on the point of its admissibility under the pleadings.

The declaration proceeds upon the theory that it is immaterial, as between the parties to this suit, who, in fact, drew the checks. The allegation in each of the special counts is, that "a certain person" drew the check. In 2 Chitty's Pleading, (10th Am. ed.) *150, it is said that it is not necessary to state the names of the parties to a bill of exchange, unless they be plaintiffs or defendants. It may also be said that the declaration virtually admits that the several checks were genuine checks of the telephone company, and that the endorsements of the payees alone were forgeries.

At the trial the court admitted evidence to show that the signatures of the drawers of the checks were forgeries. That

evidence was introduced over the objections and exceptions of appellee, appellee specifying as grounds of objection that such inquiry was irrelevant to the issues in the cause, and that under the issues, and as between the plaintiff and defendant, the signatures of the drawers of the checks were conclusively presumed to be genuine. Appellee was right in its contentions. A check payable to order is a bill of exchange payable to order on demand. The drawee of a bill of exchange or of a bank check is conclusively presumed to know the signature of the drawer, and if he accepts or pays, in the usual course of business, a bill or check whereon the signature of the drawer is a forgery, he will be estopped to afterward deny the genuineness of such signature. (*First Nat. Bank of Quincy v. Ricker*, 71 Ill. 439; Bigelow on Estoppel, (4th ed.) 498; 2 Herman on Estoppel and Res Judicata, Secs. 1006, 1008.) But the operation of an estoppel is reciprocal, for there can be no estoppel unless it be mutual. It must bind both parties, and one who is not bound by it can not take advantage of it. (2 Herman on Estoppel, Sec. 1295; Co. Lit. 352a; *Griffin v. Richardson*, N. C. 11 Ired. L. 439; *Gaunt v. Wainman*, 3 Bing. N. C. 69, and 32 Eng. C. L. 42; *Bentley et al. v. Cleaveland*, 22 Ala. 814; *Welland Canal Co. v. Hathaway*, 8 Wend. 480.) And so, as, in respect to the transactions involved in the present litigation, appellee is precluded from questioning the genuineness of the signatures of the treasurer and president of the telephone company to the nine checks, so also is appellant estopped from so doing. The case stands, as between the parties to this suit, just as though the signatures of the drawers of the checks were authentic. To rule otherwise would be to disregard the maxim of the law, *allegans contraria non est audiendus*, and to permit appellant to blow both hot and cold with reference to the same transactions.

In the present case, the admission of the incompetent testimony seems to have worked no injury, for when the trial court came to make its findings upon the issues, it manifestly disregarded such testimony, as being irrelevant.

The estoppel, however, of which we have spoken, applies only to the case of the signature of the drawer, and of the drawer alone. A drawee is bound to know the signature of his own customers, and a bank is bound to know the signatures of those who deposit with it and draw checks against such deposits. But the drawee or bank is not chargeable with knowledge of any other signature on the bill of exchange or bank check, and by accepting or paying the bill or check does not admit the genuineness of any

endorsement on it. (2 Daniel on Neg. Inst., Secs. 1364, 1365; *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. App. 67; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Vagliano v. Bank of England*, L. R. 22 Q. B. Div. 103; *Vagliano v. Bank of England*, (on appeal) L. R. 23 id. 243.) And even if a drawer draws a bill or check payable to himself or his own order, and at once endorses it, an acceptance or payment of it by the drawee admits only the genuineness of the drawer's original signature, but not the genuineness of his endorsement. (2 Parsons on Notes and Bills, 483; 2 Daniel on Neg. Inst., Sec. 1365; *Beeman v. Duck*, 11 Mees. & Wels. 251; *Williams v. Drexel*, 14 Md. 566).

At the trial, C. H. Wilson testified for appellee, as follows: "I lived in Columbus in May, June and July, 1887, and was assistant general superintendent of the Central Union Telephone Company. That company, during those months, was accustomed to draw checks on the Northwestern National Bank to my order, under the designation of 'A. G. Supt.' The signature to the endorsement of the checks mentioned in the first five counts of the declaration, and now shown me, are not my signatures. They are forgeries,—every one of them. I never authorized any one to sign my name to those checks, nor did I know they were signed, nor have I ratified or approved the endorsements, or either of them." And F. P. Ross testified as follows: "I reside at Columbus, Ohio. Was manager of the Central Union Telephone Company Exchange there in May, June and July, 1887. Was accustomed to receive, from time to time, checks drawn by the Central Union Telephone Company to my order, as manager, on the Northwestern National Bank of Chicago, generally resembling the checks now shown me, described in the sixth, seventh, eighth and ninth counts of the declaration. The endorsements on the back of them are not my endorsements. They are forgeries. I never authorized, consented, ratified or approved such endorsements."

It is urged that the forgery of the endorsements is not sufficiently proven. The claim, as we understand counsel, is, that it does not appear that the checks were really drawn in favor of Wilson and Ross, respectively, in the sense that they thereby became the owners, respectively, of them, or that it was the intention of the drawer or drawers, by means of the checks, to pay them money, or that the checks were delivered to them, but that, on the contrary, it is logically deducible from the declaration and the evidence that the checks were delivered to some person whose name is not disclosed, and that it was the intention of the drawer

or drawers that such person should in fact receive the money, and it is submitted, that in such state of the case it was not forgery on the part of the holder of the checks to endorse the name of Wilson, or that of Ross, on the checks payable to them, respectively. The contention seems to be, that there can be no real payee of a forged instrument, and no such thing as a forged endorsement of the name of the ostensible payee of a check to which the name of the drawer is forged. This argument is more specious than sound. It is a complete answer to it to repeat what we have already said in another connection: that, as between appellee and appellant, both parties are estopped from claiming that the original checks are not genuine, or that the name of the drawer signed to them is forged.

If further authority upon that point is desirable, it is afforded by the recent (1889) judgment of the Court of Appeals in the case of *Vagliano v. Bank of England*, L. R. 23 Q. B. Div. 243. The amount there involved was about \$350,000. In the bills of exchange there in question, both the signatures of the drawer and the endorsements of the payee were forged. In this respect it was like the case at bar, and in respect to the questions at issue it was also singularly like it. It may be well to remark, by way of explanation of some of the language that we shall quote, that one of the questions under examination was whether a certain sub-section 3 of a statute of 1882 was a mere codification of existing law or an alteration of it. The court there said: "The bank can only justify the payment that has been made, by showing that the documents were to be considered in the light of bills originally payable to bearer, in which case the bank would be authorized to pay the amount to the person who was the holder. Counsel for the bank contended before us that the payee named, C. Petridi & Co., were fictitious payees. A real and existing firm of that name were, in fact, carrying on business at Constantinople, and had been on previous occasions payees of genuine bills drawn by Vucina upon Vagliano Bros. It was unquestionably intended by Glyka that the acceptor should believe, and the acceptor in each case did believe, that the payees indicated were the C. Petridi & Co. in question, but it was urged by the appellant's counsel that as Glyka, the forger, intended to forge C. Petridi & Co.'s names, and never meant that they should have anything to do with the bills, the payees were fictitious. * * * Before accepting such a construction of the sub-section it is desirable to state with precision what was the previous commercial law upon the subject. The law merchant seems to have been clear, and to have been

based throughout on the principle of the law of estoppel, which, in its turn, is conformable with reason and business principles. The genuineness of the endorsement of the payee was a matter as to which, except in one special instance, no estoppel prevailed. The one exception to the rule was the case described in Story on Bills of Exchange, Sections 56 and 200. This exceptional rule in the case of fictitious bills is based, as has been stated, on a special application to a particular case of the principle of estoppel, which plays so important a part in the law merchant." Then, after a review of the cases, the court added: "Down, therefore, to the date of the passing of the recent statute, the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer, was based uniformly upon the law of estoppel, and applied only against the parties who, at the time they became liable on the bill, were cognizant of the fictitious character or of the non-existence of the supposed payee. The principle that lies at the root of the exception is, that a reasonable effect must be given, in favor of *bona fide* holders, to the act of acceptance, and that where it appears that although there was a named payee he was so completely fictitious or non-existing that the acceptor could not have intended to restrict payment to such payee or his order, the acceptor, who must be taken to have intended that his acceptance should have some commercial validity, was estopped from saying that the bill was not a bill payable to bearer. If the exception is to be extended beyond this, it will rest upon no principle at all, and this strange result would follow: that where, for purposes of fraud, a payee's name is introduced, (whose signature it is intended to forge) the acceptor, though innocent and ignorant, will be bound to pay, and his bankers will be justified in paying without any endorsement at all. The acceptor, in such cases, will be a helpless victim. Ignorant, himself, of the fraud, believing from first to last that he has accepted a bill payable only to a particular payee or to his order, he will be held, in law, nevertheless to have accepted a bill payable to bearer. The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle. * * *

Petridi & Co. of Constantinople did not cease to be real persons because Glyka meant to suggest, falsely, that they were to be the payees, and meant himself to forge their names. According to the

ordinary sense of the English language the payees of these bills were not fictitious, but real, persons, from first to last, and to construe the law otherwise would be to render it the source of needless disorder and confusion in business transactions. The instruments in question were not, therefore, payable to bearer, and the bank having paid upon forged endorsements, must, in the absence of any other ground of defense, take the consequences."

When appellant endorsed the nine checks, and collected from appellee the sums of money called for by them, it warranted the genuineness of all the preceding signatures endorsed on the respective checks, including the endorsements on the checks of the names of the respective payees named in such checks. (2 Parsons on Notes and Bills, 588; *Williams v. Tishomingo Savings Institution*, 57 Miss., 633; Story on Bills of Exchange, Sec. 225.) And where a drawee or a bank pays a bill of exchange or a bank check to an endorser who derives title through a prior forged endorsement, he may recover back the money so paid, on discovery of the forgery, provided he makes demand for repayment within a reasonable time after the discovery of such forgery. (2 Daniel on Neg. Inst., Secs. 1364, 1372; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Williams v. Tishomingo Savings Institution*, *supra*.)

The evidence shows that appellee accepted two of the checks, "payable through Chicago Clearing House," prior to the time that they were transferred to Chapin & Gore. This makes no difference. An acceptor is bound to look only at the face of the bill or check, and an acceptance never proves an endorsement; and even if the supposed endorsements of the payees of said two checks were on them at the times when they were respectively accepted, yet such acceptances did not admit the handwriting of the endorsers. (*Smith v. Chester*, 1 Term Rep. 654; *Robinson v. Yarrow*, 7 Taunton, 455; 2 Eng. Com. Law, 445.) In this case, the acceptance or certification of the two checks simply warranted the genuineness of the signatures of the drawer, and that it had funds sufficient to meet them, and engaged that those funds should not be withdrawn from the bank by the drawer, and that the bank would pay through the agency of the Chicago clearing house the amount, if any, actually due on the check, to the person legally entitled to receive it. The acceptance or certification did not warrant the genuineness of the bodies of the checks, either as to the payees or the amounts, or warrant the genuineness of the endorsements on the checks. (*Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. App. 67; *Security Bank v. Nat. Bank*, 67 id. 458.)

The case made by the evidence introduced by appellee was in

substance as follows: Nine several checks, of different dates and amounts, were made by some person, and signed and countersigned in manner and form as stated in the nine special counts of the declaration, five of which were made payable to C. H. Wilson, A. G. superintendent, and the remaining four to F. P. Ross, manager, and directed said checks to the appellee bank. All of these checks, each of them purporting to be endorsed by the payee therein named, were transferred, for value, to Chapin & Gore, who endorsed each of them "For deposit in the First National Bank to the credit of Chapin & Gore," and delivered them to appellant, and appellant also endorsed each of them "Pay through Chicago Clearing House only to First National Bank," and through said clearing house presented them, so endorsed, to appellee for payment, and received from it, in payment thereof, the full amounts called for by said checks. None of said checks were in fact endorsed by the payees therein respectively named, but all of the endorsements purporting to be made by the payees were forgeries, and appellee paid said checks in ignorance of such forgeries. After business hours on Saturday, July 23, 1887, appellee made discovery of the forgeries, and on the following Monday, July 25, 1887, it tendered the checks back to appellant and demanded repayment of the money paid by it on the same, but appellant refused to make such repayment. Two of said checks, before they came into the hands of Chapin & Gore, had been accepted by appellee, it writing on the face of each of them these words: "Accepted payable through Chicago Clearing House."

In our opinion these facts established, *prima facie*, a right of action in appellee as against appellant, and it follows that the trial court, in refusing to hold the eighth proposition submitted by appellant, to the effect that under the evidence the finding and judgment should, as a matter of law, be for appellant, committed no error.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Heuertematte v. Morris (1885), 101 N. Y. 63.

The material facts are stated in the opinion.

F. R. Coudert, for appellants.

C. E. Coddington, for respondent.

RUGER, Ch.J. In the discussion of this case it is unnecessary to consider particularly the agency of Hourquet & Poylo in the transaction, as they acted solely as the gratuitous agents of the plaintiffs, and had no interest in the subject of the business. It may, therefore, be treated as a transaction occurring directly between the plaintiffs and Ran Runnels, and concisely described, was to the following effect: The plaintiffs were merchants doing business at Panama, and one Christofel was a customer and debtor of theirs, residing at San Juan del Sur, near Rivas, in the State of Nicaragua. Christofel was desirous of discharging his obligations to the plaintiffs, but was embarrassed in doing so by the infrequency of communication between Rivas and Panama, and the want of a system of exchange enabling him to transmit funds safely and expeditiously from one place to the other. Under these circumstances the plaintiffs consulted Hourquet & Poylo, a business firm at Panama, as to the best manner of collecting the debt. The plaintiffs were informed by Hourquet & Poylo that Ran Runnels was a correspondent of theirs residing at Rivas, and that the collection could probably be made through him, and offered to transmit a draft on Christofel to Runnels, for that purpose. Thereupon the plaintiffs made their draft on Christofel at sixty days for \$1,000 payable to Hourquet & Poylo, who indorsed the same to Runnels and forwarded it to him at Rivas for collection. In due time it was received by Runnels, and at its maturity was paid to him, in Columbian currency.

It becomes important now to determine the legal obligations and duties of the parties toward each other at this stage of the transaction. In the collection of the draft Runnels acted as the mere agent of the plaintiffs, and had no interest in the proceeds except, perhaps, a lien thereon for the value of his services in making the collection. He had no right or authority to use such funds for his individual purposes, and his sole duty in relation to them, was that of their transmission to his principals. The nature of the business impliedly authorized him, to make such transmission according to the usages of trade, and in the absence of such usages to do so by some other method which should, in the exercise of

reasonable care and prudence, promise to accomplish the object intended. It was, therefore, open to him to transmit the funds received in specie as they were collected, or he could have purchased a bill of exchange, if opportunity served, at that place, and transmitted that; or he could remit them in any other way deemed most safe, convenient and desirable to him, subject to the approval by his principals, of the method adopted. It does not appear in the case but that Runnels was a merchant or banker and accustomed to sell exchange upon foreign places. However that may be, he in fact sent to the plaintiffs, February 4, 1879, immediately upon collection, the proceeds thereof, less cost of collection and exchange, by the draft in suit. This was his own draft upon the defendant Morris, at New York, at ninety days' sight. Upon the receipt of this draft by the plaintiffs, it was accepted by them and remitted to New York, for presentation to, and acceptance by the drawee, and the same was accepted by him February 26, 1879.

The sole question in the case is whether the plaintiffs were *bona fide* holders for value of the draft. We cannot doubt but that they were. If on receiving the funds in question Runnels had purchased with them a bill of exchange draft from a merchant, or banker, according to the usages of trade, and transmitted the same to the plaintiffs, no question could arise but that he acted as their agent in the transaction, and they would have been *bona fide* holders of such paper within all definitions of that character, and we are unable to see the difference in principle between such a case and the transaction in question. The funds collected by Runnels were, until they consented to their appropriation by him, at all times the property of the plaintiffs. Runnels' sole duty in relation to them was that of transmission to the plaintiffs, and until that duty was legally performed he held them in a fiduciary capacity for a specified purpose. His duty of transmission could not be performed by remitting his own obligation, payable at a future day, except by the consent and approval of the plaintiffs. Until this consent and approval was given the funds remained the property of the plaintiffs, and any use of them by Runnels before that time would have constituted a violation of his duty to his principals, which it cannot be presumed he committed.

Doubtless the lack of adequate facilities of exchange between Rivas and Panama induced Runnels to offer, and the plaintiffs to accept, the mode of remittance adopted, and it was entirely competent for Runnels to propose, and for the plaintiffs to accept such a solution of the inconveniences of the situation; but no title to the funds collected passed to Runnels, until the acceptance of the

draft by the plaintiffs. After that and not till then he was authorized to use those funds as his own.

By the original employment the plaintiffs contemplated no credit to Runnels and he had no right to, and it does not appear that he even supposed, he acquired any right to use the funds in question for his own purposes, or that he ever did so use them. The conventional relation of debtor and creditor never existed between Runnels and the plaintiffs until the acceptance of his draft upon Morris, and then those relations were governed by the liabilities existing by force of the draft alone.

In accordance with the rule which precludes a court from presuming a violation of duty by an individual, we must assume that Runnels performed his duty, and his whole duty, to the plaintiffs as their agent. This required him to safely keep their funds until he had transmitted them according to the usage of trade, or in some other mode approved by them. The legal effect of the method adopted was to transfer the title to the funds collected, to Runnels simultaneously with the acceptance by the plaintiffs of Runnels' draft upon Morris, and was the precise equivalent of the payment of so much money in the immediate purchase of a draft or bill of exchange by one person from another. We are, therefore, of the opinion that the plaintiffs were the *bona fide* holders for value of the draft in suit and are entitled to recover thereon.

The General Term conceded that the plaintiffs were *bona fide* holders for value of the bill before acceptance, but deny them that character after acceptance as against the acceptor. We think the concession is fatal to the conclusion reached by that court.

It is said that the *Farmers & Mechanics' Bank v. Empire Stone Dressing Co.* (5 Bosw. 290) is authority for the position. It is true that some expressions of the learned judge writing in that case may justify the citation, yet it should be considered that those remarks were unnecessary to the decision of the case, and the same court have twice since then refused to follow it.

We conceive the rule there laid down finds no support in the doctrines of the text-writers or the reported cases. (*Philbrick v. Dallett*, 2 J. & S. 370; *First Nat. Bank of Portland v. Schuyler*, 7 id. 440; *Parsons on Bills and Notes*, 323; *Daniels on Neg. Inst.*, § 534; *Edwards on Bills* [2d ed.], 410.)

If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of

funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. (Parsons on Bills, 323, 544; *Arpin v. Chapin*, Mass. Sup. Ct., Oct., 1885.) The drawee can of course upon presentment refuse to accept a bill, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept a bill, he becomes primarily liable for its payment, not only to its indorsees but also to the drawer himself.

The delivery of a bill or check by one person to another for value implies a representation on the part of the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawee is not allowed to retract. (Daniels on Neg. Inst., 534; Parsons on Bills, 323, 544, 545.) By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, is not afterward at liberty to controvert the fact as against a *bona fide* holder for value of the bill.

The payment to the drawer of the purchase-price furnishes a good consideration for the acceptance which he then undertakes shall be made, and its subsequent performance by the drawee is only the fulfillment of the contract which the drawer represents he is authorized by the drawee to make.

The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration, or for accommodation, as against a *bona fide* holder for value of such paper, flows logically from the conclusive force given to his admission of funds, and is elementary. (Daniels on Neg. Inst., §§ 532-534; Edwards on Bills, 410; *Harger v. Worrall*, 69 N. Y. 371; *Com. Bk. of Lake Erie v. Norton*, 1 Hill, 501; *Robinson v. Reynolds*, 2 Q. B. 196, 211; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181.)

Of course the case determined upon the ground that the payee of such paper received it to apply upon an antecedent debt, or that it had been unlawfully diverted from the purpose for which it was designed, have no application to the circumstances of this case.

The judgments of the courts below should, therefore, be reversed and a new trial ordered, with costs to abide the result.

All concur.

Judgment reversed.

CONTRACT OF THE CERTIFIER.

§ 189.

Union Trust Co. v. Preston Nat. Bank (1904), 136 Mich. 460.

Error to Wayne; Donovan, J.

Assumpsit by the Union Trust Company, receiver of the City Savings Bank of Detroit, against the Preston National Bank of Detroit, to recover the amount of a deposit. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

Geer, Williams & Halpin, and *H. R. Martin*, for appellant.

Walker & Spalding, for State Savings Bank (contending with appellant).

Bowen, Douglas, Whiting & Murfin (John C. Donnelly and Frederick W. Whiting, of counsel), for appellee.

CARPENTER, J. Plaintiff brought this suit to recover a conceded balance of \$21,585.11 owing by defendant to the City Savings Bank at the time plaintiff was appointed receiver. Defendant sought to set off against this indebtedness the sum of \$100,000, represented by a check drawn on said City Savings Bank January 24, 1902, by F. C. Andrews, payable to defendant's order, and certified in due form by the teller of the insolvent bank. It appeared that, at the time this check was certified, its maker, Andrews, instead of having funds to his credit in said bank, had overdrawn his account, as shown by the bank's books, "to the amount of \$405,000." The defendant offered to prove that it received said check, after certification, on the day it was drawn, in the usual course of business, and paid to said Andrews, the maker, full value therefor, and at that time had no notice or knowledge of any infirmity in said check, or of the fact that the account of said Andrews was overdrawn. This evidence was excluded, on the ground that said check was invalid in the hands of a *bona fide* holder, and a verdict directed for the plaintiff for the amount of the deposit in defendant's hands. The sole question presented by this record relates to the correctness of this holding.

It is authoritatively settled and conceded that at common law the fact that the maker of a certified check had no funds in the bank affords no defense, if the check, negotiable in form, as in this case, has passed into the hands of a *bona fide* holder. See *Merchants' Bank v. State Bank*, 10 Wall. 604; *Farmers' &*

Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125 (69 Am. Dec. 678). This case is not, however, to be determined solely by common-law principles. The correctness of the holding of the trial court depends upon the proper construction of certain statutory provisions in our banking act relative to the certification of checks. Section 6108, 2 Comp. Laws, being section 19 of the general banking act, reads:

"It shall not be lawful for any officer, clerk, agent, or employee of a bank to certify a check, unless the amount thereof actually stands to the credit of the drawer upon the books of the bank or to resort to any device, or receive any fictitious obligations, direct or collateral, in order to evade the provisions of this prohibition; and any officer, clerk, agent, or employee who shall attempt any such evasions shall, upon conviction thereof, be deemed guilty of a misdemeanor, and punished as provided in section fourteen of this act."

Other sections of the banking act, viz., section 14 (section 6103, 2 Comp. Laws), section 18 (section 6107, 2 Comp. Laws), and section 58 (section 6147, 2 Comp. Laws), make the violation of section 19 a crime.

In construing this act, we have not the benefit of decisions of other courts construing a precisely similar act, for, with the exception of the national banking act, which will be hereafter referred to, there is no similar act.

It will thus be seen that the certification in question was forbidden by law, and punishable as a crime. The statute does not, however, expressly declare that the check so certified shall be void in the hands of a *bona fide* holder. Indeed, it does not expressly declare that it shall be void in the hands of one who is not a *bona fide* holder. The fact, however, that the certification is forbidden and made a crime, compels the inference that the legislature intended to avoid such certification between the original parties (see *Heffron v. Daly*, 133 Mich. 613 [95 N. W. 714]); and this, it is almost unnecessary to say, avoids it in the hands of every one not a *bona fide* holder. It by no means follows, however, because a contract made in violation of law, common or statutory, is void between the original parties, that, if given the form of negotiable paper, it is void in the hands of a *bona fide* holder. Indeed, it is the distinguishing characteristic of the law of negotiable paper that, when a contract takes that form, it is not, in the hands of a *bona fide* holder, subject to the defense which avoided it in the hands of the original parties. Negotiable

paper in the hands of a *bona fide* holder is not open to the defense that the contract from which it arose was illegal or forbidden by the principles of the common law. A note given to compound a felony is good in the hands of a *bona fide* holder. (*Clark v. Ricker*, 14 N. H. 44; *Wentworth v. Blaisdell*, 17 N. H. 275.) Nothing less than a statutory enactment will subject negotiable paper in the hands of a *bona fide* holder to the defense of illegality in its inception.

What, then, is the effect of a statute which merely prohibits the making of a particular contract, and punishes its making as a crime? How shall we determine what consequences the legislature intended should follow a violation of this law? Manifestly by applying in its construction the principles of the common law.

"Statutes are not, and cannot be, framed to express in words their entire meaning. They are framed, like other compositions, to be interpreted by the common learning of those to whom they are addressed,—especially by the common law, in which it becomes at once enveloped, and which interprets its implications and defines its incidental consequences. That which is implied in a statute is as much a part of it as what is expressed." (2 *Suth. Stat. Constr.* § 334).

In accordance with these principles, we would assume, and, as heretofore stated, we do assume, that the legislature intended to make such contract void between the parties; and we would likewise assume that it did not intend, if the contract took the form of negotiable paper, to affect its validity in the hands of a *bona fide* holder. But plaintiff's counsel contend that it is settled by authority that, when a contract is prohibited and made a crime by statute, such a contract, if it takes the form of negotiable paper, is void in the hands of a *bona fide* holder; and they rely upon the following authorities: 1 *Clark & M. Priv. Corp.* § 225; *Endl. Interp. Stat.* § 449; 2 *Suth. Stat. Constr.* § 336; *Anson, Cont.* 172; *Heffron v. Daly*, 33 Mich. 613 (95 N. W. 714); *State Life-Ins. Co. v. Strong*, 127 Mich. 346 (86 N. W. 825); *Loranger v. Jardine*, 56 Mich. 518 (23 N. W. 203); *Bowditch v. Insurance Co.*, 141 Mass., at page 293 (4 N. E. 798, 55 Am. Rep. 474); *Union Nat. Bank v. Railway Co.*, 145 Ill. 208 (34 N. E. 135); *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85 (8 Am. Rep. 626); *Borough of Milford v. Milford Water Co.*, 124 Pa. St. 610 (17 Atl. 185, 3 L. R. A. 122); *Edgerly v. Hale*, 71 N. H. 138 (51 Atl. 679); *Woods v. Armstrong*, 54 Ala. 152 (25 Am. Rep. 671); *McConnell v. Kitchens*, 20 S. C. 430 (47 Am. Rep.

845) ; *Texarkana, &c., R. Co. v. Lumber Co.*, 67 Ark. 542 (55 S. W. 944) ; *Snoddy v. Bank*, 88 Tenn. 573 (13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918).

None of these authorities, except *Texarkana, etc., R. Co. v. Lumber Co.* and *Snoddy v. Bank*, which will receive attention later in this opinion, related to a case of negotiable paper in the hands of a *bona fide* holder. All that can justly be claimed for these authorities, with the exceptions above referred to, is that they hold that, when the making of a contract is prohibited and made a crime by statute, it is void as between the original parties, or—what is the same thing—as between parties who do not stand in the attitude of a *bona fide* holder of negotiable paper arising therefrom. It is true that many of these decisions say that such a contract is void, and one of them (see *Borough of Milford v. Milford Water Co.*) says that it “is utterly void, and there is no power that can breathe life into such a dead thing.” This language must, however, in accordance with every just principle of construction, be understood as applying to the case before the court. It may not be improper to describe the particular contracts under consideration as void, and as utterly void. But it by no means follows that negotiable paper issued on such contract would be void in the hands of a *bona fide* holder for value. These authorities cannot be regarded as authority for the proposition for which plaintiff’s counsel cite them. They are not inconsistent with the rule (which we deem it our duty to undertake to show is well settled by authority) that, though a contract is prohibited and made a crime by statute, that contract, if it takes the form of negotiable paper, is valid and enforceable in the hands of a *bona fide* holder. Says Mr. Daniel, in his work on Negotiable Instruments, § 197 :

“The *bona fide* holder for value, who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed ‘*mala in se*,’ and those founded in positive statutory prohibition, which are termed ‘*mala prohibita*.’ The law extends this peculiar protection to negotiable instruments because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect.”

In *Vinton v. Peck*, 14 Mich. 287, defendant was an accommodation maker of a negotiable promissory note dated on Monday, but in fact made the preceding Sunday, contrary to the statute

expressly prohibiting, under penalty of a fine, "any manner of labor, business, or work, except only works of necessity and charity." (See 1 Comp. Laws 1857, § 1574.) It was held that the note was valid and enforceable in the hands of a *bona fide* purchaser, because "the statute has not declared that notes made contrary to the Sunday law shall be void under all circumstances. Their invalidity is only to be implied from the prohibition of Sunday business, and under such a statute a *bona fide* holder is protected."

State Capital Bank v. Thompson, 42 N. H. 369, is almost precisely like the above case.

In *New v. Walker*, 108 Ind. 365 (9 N. E. 386, 58 Am. Rep. 40), a negotiable note was taken in violation of a statute requiring, under a penalty, to be stated therein, "Given for a patent right." The court held this note valid in the hands of a *bona fide* holder, saying (pages 374, 375):

"Our opinion is that a statute making it a crime to take promissory notes in a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority,"—citing, among other cases, *Palmer v. Minar*, 8 Hun. 342, and *Cook v. Weirman*, 51 Iowa, 561 (2 N. W. 386), which are similar to the principal case.

In *Smith v. Bank*, 9 Neb. 31 (1 N. W. 893), the court expressed its disapproval of a statement in *Kittle v. DeLamater*, 3 Neb. 325:

"Or, if the note be founded upon an illegal consideration, prohibited by some positive statute, no recovery can be had, even though the indorsee may not be privy to the original transaction."

In *Hart v. Machine Co.*, 72 Miss. 809 (17 South. 769), it was held that negotiable paper issued in violation of the statute of Tennessee forbidding corporations doing business in that State without compliance with its provisions was valid in the hands of a *bona fide* holder, the court saying (pages 833, 834):

"The statute, while forbidding foreign corporations from doing business in the State without compliance with its conditions, does not declare, by express terms, that any contracts made with delinquent corporations shall be void, nor does it denounce as invalid any securities given by or to it under such contracts. The English and some of the American statutes against usury and gaming declared that all assurances and securities given in consideration thereof should be void. Under such declarations,

it has very generally been held that negotiable paper, even in the hands of a *bona fide* holder, is void, because of the language of the law. But where only the contract is declared void, and there is no declaration of nullity against securities, it is held that while, as between the parties, and those taking with notice or after maturity, no recovery can be had, a *bona fide* holder will be protected."

In *Press Co. v. Bank*, 7 C. C. A. 248, 58 Fed. 321, notes issued in violation of a statute forbidding foreign corporations doing business except in compliance with its terms were held valid in the hands of a *bona fide* holder, the court saying (page 249, 7 C. C. A., page 322, 58 Fed.):

"It is urged that public policy forbids a recovery; that to hold otherwise will nullify the statute. We do not think so. If the legislature intended the consequences claimed, we would expect it to say so."

In *Lynchburg Nat. Bank v. Scott*, 91 Va. 652 (22 S. E. 487, 29 L. R. A. 827, 50 Am. St. Rep. 860), it was contended that a note obligating the maker to pay usurious interest was void in the hands of a *bona fide* holder. The court answered that contention by saying (page 659):

"If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void."

So it has been held:

"If a statute declares a security void, it is void in whosoever hands it may come. If, however, a negotiable security be founded on an illegal consideration,—and it is immaterial whether it be illegal at common law or by statute,—and no statute says it shall be void, the security is good in the hands of an innocent holder, or of any one claiming through such a holder." (*Glenn v. Bank*, 70 N. C. 191; *Smith v. Bank*, 9 Neb. 31 [1 N. W. 893]; *Grimes v. Hillenbrand*, 4 Hun. 354; *Hill v. Northrup*, 4 Thomp. & C. 120; *Converse v. Foster*, 32 Vt. 828; *Lauter v. Trust Co.*, 29 C. C. A. 473, 85 Fed. 894; *Hatch v. Burroughs*, 1 Woods, 439 [Fed. Cas. No. 6,203]).

Other authorities hold that "when a statute, expressly or by necessary implication, declares the instrument absolutely void, it

gathers no vitality by its circulation, in respect to the parties executing it." (1 Daniel, Neg. Inst., § 197; *Pope v. Hanke*, 155 Ill., at page 625 *et seq.* [40 N. E. 839, 28 L. R. A. 568]; *Thompson v. Samuels*, [Tex.] 14 S. W. 143).

We have already referred to the fact that two of the authorities cited by plaintiff's counsel, viz., *Snoddy v. Bank*, 88 Tenn. 573 (13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918), and *Texarkana, etc., R. Co. v. Lumber Co.*, 67 Ark. 542 (55 S. W. 944), arose upon negotiable paper in the hands of a *bona fide* holder. *Snoddy v. Bank* is authority for this proposition: "Notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands." This, as we have already shown, and as we understand plaintiff's counsel to concede, is opposed to almost unanimous authority, and cannot, therefore, be accepted as a correct declaration of the law. In *Texarkana, etc., R. Co. v. Lumber Co.*, suit was brought upon a negotiable promissory note made by the plaintiff corporation, contrary to the constitution and statutes of the State of Texas, for the accommodation of its president. It was held that this note was void in the hands of a *bona fide* holder. The argument of the court in support of this contention is this:

"A contract prohibited by the constitution or statute of a state, although negotiable in form, is not so in fact, and no innocence or ignorance on the part of the holder will make it enforceable. It is an absolute nullity,"—citing 1 Daniel, Neg. Inst., § 807, and decisions of the Supreme Court of the United States and the Supreme Court of Texas.

The decisions referred to do not sustain the proposition for which they are cited. The section of Daniel cited has reference to cases where an express statutory provision declares a note void. We cannot follow this authority without repudiating our own decision of *Vinton v. Peck*, 14 Mich. 287, and the almost unanimous authority of other courts.

Plaintiff's counsel assert that the case at bar is not ruled by decisions which hold that negotiable paper based upon an illegal consideration is valid in the hands of a *bona fide* holder. They insist that such cases are not authority, because the statute under consideration in this case did not merely make the consideration illegal; it actually "prohibited and penalized" the making of the contract itself. We are unable to see that this circumstance, if it affords a sound distinction, distinguishes the case at bar from several of the cases above referred to. In *Vinton v. Peck*, *supra*,

the particular act which was prohibited and punishable by fine was the making of the note in suit. It is true that the statute did not in express terms prohibit the making of the note, but, when it prohibited the doing of any business, it did prohibit the making of the note, for, as was expressly said by the supreme court of New Hampshire in *State Capital Bank v. Thompson*, 42 N. H., at page 370,—

“Under the construction of our statute prohibiting unnecessary labor on Sunday, the execution and delivery of a promissory note upon Sunday has been declared ‘business of a person’s secular calling;’ * * * and, as such, is prohibited under a penalty.”

So, in *New v. Walker*, 108 Ind. 365 (9 N. E. 386, 58 Am. Rep. 40), a *bona fide* holder was allowed to recover on a note given for a patent right in violation of a statute which prohibited, under a penalty, the delivery of the note without the insertion of the clause that it was “given for a patent right.” It is idle to say that the making of this note was not prohibited by a penal statute. See, also, *Palmer v. Minar*, 8 Hun. 342; *Cook v. Weirman*, 51 Iowa, 561 (2 N. W. 386). The only distinction that can be drawn between those cases and the case at bar is in the nature and extent of the punishment for making the contract prohibited by law. Such an inconsequential distinction will not change a rule of law.

We conclude, therefore, that, though the making of a contract is prohibited and made a crime by statute, yet that contract, if it takes the form of negotiable paper, is valid in the hands of a *bona fide* holder for value. We think it also settled that negotiable paper in the hands of a *bona fide* holder for value is not subject to any defense which would avoid it in the hands of the original holder, unless some statute, either expressly or by necessary implication, so declares. We affirm the proposition, denied by plaintiff’s counsel, that though the statute, “by necessary implication, make the contract made in violation thereof absolutely void as to non-negotiable contracts, and as to negotiable contracts in the hands of persons having knowledge of the defects, yet * * * the statute will not be considered to have that effect should the contract be negotiable in form, and be found in the hands of a *bona fide* holder.” No strength is added to the foregoing proposition by saying that the statute, by implication, makes void all non-negotiable contracts, and negotiable contracts in the hands of persons having knowledge of the defect; for it follows from elementary legal principles that all such contracts are unenforceable if the original contract in the hands of the first parties thereto cannot be enforced.

Nor is strength added to the proposition by saying that such contracts are "absolutely void." If they cannot be enforced in the hands of the original holders, we see no reason for quarreling with a person who chooses to call them absolutely void, though others might describe them as voidable. See *Thompson v. Samuels*, (Tex.) 14 S. W. 143. It follows that plaintiff's counsel deny that negotiable paper can be enforced in the hands of a *bona fide* holder for value, if it arises from a contract which, by implication of law, is void or unenforceable between the original parties. In our judgment, the principle so denied is a correct statement of the law. If it were otherwise, all negotiable paper arising out of illegal and forbidden transactions would be void in the hands of *bona fide* holders for value, and yet nothing is better settled, by principle and authority, as we have already shown, than that such paper is valid.

There remains to be considered this question: Does the statute, by necessary implication, or by implication, even, make the check void in the hands of a *bona fide* holder for value? We have already seen that such implication cannot be found from the circumstance that the certification is prohibited and made a crime. It is insisted, however, that the intent of the legislature to make the check void in the hands of a *bona fide* holder is indicated by other circumstances. It is contended that the purpose of the legislature in enacting this law was "to protect the citizens, depositors, and stockholders against such an act as was committed in the case at bar," viz., an attempt to withdraw the funds of the bank by means of a check falsely certified, and that, to make this purpose effectual, the check must be held void in the hands of a *bona fide* purchaser. If it were true that the sole purpose of the statute was to protect the depositors and stockholders of a bank against the criminal acts of its own officials, this argument would be very forcible. Are we warranted in declaring that the sole purpose of the legislature in passing this statute was to protect banks and their depositors from the consequences of criminal misconduct of their officials, and that there were not other purposes, which would fail if plaintiff's construction of the act prevails? We must bear in mind that the legislature, in passing this statute in 1887, had not learned the lessons taught by the disastrous failure of the City Savings Bank in 1902, which occasions this litigation, though counsel do not agree as to precisely what lessons are taught by this failure. We shall not, therefore, be materially aided—indeed, we are rather likely to be misled—if we look to that disaster to throw light upon the legislative purposes. The

legislature has not, by this statute, expressly declared its purpose. Its purpose, then, is to be inferred. While we are bound to infer that one of its purposes was to protect the bank and its depositors from the criminal conduct of its officials, it is likewise to be inferred that there was a broader purpose, viz., to protect safe banking generally. We may infer the legislative purpose on the assumption that the law was made to be observed, as well as on the assumption that it would be violated. If the law is observed, we can readily see that it will benefit, and thus infer the legislative purpose to benefit, not merely the depositors and stockholders of banks whose officers are called upon to certify checks, but all persons taking such checks. In other words, the observance of this law tends to increase the certainty of the payment of certified checks and to promote safe banking.

In the case at bar, the allowance of the certified check will inure to the benefit of the stockholders of defendant bank, and to the damage to the depositors of the City Savings Bank, represented by plaintiff. But the law we declare in this case will certainly apply to a case, if such a case should, as it may, arise, where the allowance of such a check inures to the benefit of the depositors of the bank which takes it, and damages no one but the stockholders of the bank whose officials criminally certified it. Such a case would be presented here if the payment of the check under the consideration would not sensibly impair the capital of the City Savings Bank, and if the funds withdrawn by its means from defendant had rendered it impossible for the latter to pay its depositors. And in such a case, under plaintiff's contention, the court should say that the legislature intended to prefer the interest of the stockholders of the bank whose officers were guilty of criminal misconduct, to that of the depositors of another bank damaged by such misconduct. We do not think we are warranted in imputing to the legislature such an intent. We think it not improper to infer that it was the legislative purpose to protect the interests of the stockholders and depositors of all banks, and not merely the stockholders and depositors of particular banks whose officials might be guilty of criminal misconduct.

The language of the statute prohibiting the certification does not compel the conclusion that its sole purpose was to protect the bank and its depositors against the criminal misconduct of its officials. Certification of a check is prohibited and made a crime "unless the amount thereof actually stands to the credit of the drawer upon the books of the banks." It will thus be observed that certification is forbidden even though the drawer has funds

in the bank which do not stand to his credit upon the bank's books, and certification is not forbidden if the amount of the certified check is credited upon the books, though that credit is fictitious. In making the last statement, we have not forgotten that plaintiff contends that the statute does forbid certification where the entry upon the books is fictitious; but, as stated above, we do not agree with this contention. The statute in such case forbids the fictitious entry; it does not forbid the false certification resulting therefrom. In many cases the distinction might be unimportant; in others it might be very important. Suppose the bookkeeper or cashier of the bank made the fictitious entry, and the teller, acting in the best of faith, relying thereon, certified a check. No reasonable construction of the act would make this certification a crime, or bring it within the statutory prohibition. It will thus be seen that certification is prohibited in a class of cases where the depositors and stockholders of the bank whose officers violated the law cannot be injured, and it is permitted in a class of cases where they are injured. If the sole purpose of the act has been to protect the depositors and stockholders of the bank whose officers were guilty of this misconduct, different language would have been used. We are not, therefore, warranted in saying that this act was passed solely for the purpose of protecting the bank and its depositors from the criminal misconduct of its officers. We are warranted in declaring that there was a legislative purpose in passing this act which would be defeated by the construction contended for by plaintiff.

If the section is construed as the plaintiff contends,—if checks duly certified are void in the hands of *bona fide* holders because the amount thereof did not stand to the credit of the drawer on the books of the bank,—this consequence follows: Certified checks, instead of being, as heretofore, the negotiable paper of the bank, and passing as current upon the faith of the bank's credit, will pass, if at all, only upon the credit of the particular bank official who certified it. Every person to whom a certified check is offered will be called upon to determine, not the credit of the certifying bank, not the authority of the certifying official, but the integrity and diligence of that official. Though one may have all confidence in such integrity and diligence, he may hesitate to take the check, because he fears that others to whom he may wish to transfer it lack such confidence. It will result, therefore, that certified checks, instead of being regarded in commercial circles with credit and favor, as heretofore, will be regarded with a degree of suspicion, and are likely to be discredited. If the legis-

lature intended this consequence,—and they must have intended it if they intended that the act should receive the construction contended for by plaintiff,—it seems strange that they left their intent to be ascertained as a matter of doubtful inference; it seems strange that they still left to banks the power of certifying checks, without any clear suggestion that such power was so greatly limited. “If the legislature intended the consequences claimed, we should expect it to say so.” (*Press Co. v. Bank*, 7 C. C. A., at page 249, 58 Fed. 322).

It is suggested, rather than urged, by plaintiff’s counsel, that on the authority of *Spitzer v. Village of Blanchard*, 82 Mich. 234 (46 N. W. 400), the statute under consideration should be construed as denying to the teller authority to bind his principal, the bank, by the certificate under consideration. In *Spitzer v. Village of Blanchard* it was held that bonds issued by a village in excess of the amount authorized by its incorporation act are void in the hands of a *bona fide* holder, the court saying (page 246) :

“The amount of the bonds to be issued was known, and appears upon the face of the bonds. The assessed valuation and the vote of the electors are matters of public record, and are open to all the world for inspection and ascertainment, and are as accessible to intending purchasers as other persons. The limitation of power upon the common council appears in the public statute, and is presumed to be known by all dealing with corporate authorities or in corporate bonds.”

To show the distinction between that case and the case at bar, we quote from other language in that opinion (page 244) :

“Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders; the distinction being between questions of fact and questions of law. If it is a question of fact, and the board of officers are authorized by law to determine the fact, then their determination is final and conclusive.”

If it were necessary to further distinguish that case from the case at bar, we cannot do better than quote the language of distinguished jurists. Said Mr. Justice Selden in *Farmers’ & Mechanics’ Bank v. Butchers’ & Drovers’ Bank*, 16 N. Y. 135 (69 Am. Dec. 678) :

“It is, I think, a sound rule that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has, or is presumed

to have, any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it."

Said Justice Davis in *New York, etc., R. Co. v. Schuyler*, 34 N. Y., at page 73:

"Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power may rely upon the representation."

If authority is needed for the proposition, which seems obvious, that the certification in question related to an act peculiarly within the teller's knowledge, we refer to *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284 (71 N. W. 453, 67 Am. St. Rep. 463).

It is also urged that it was the intention of the framers of the general banking act to follow generally the provisions of the national banking law, and that we are warranted in inferring an intent to avoid a check falsely certified, in the hands of a *bona fide* holder, from certain changes,—particularly from the fact that, when section 19 (2 Comp. Laws, § 6108) was framed, language was omitted which in the corresponding section of the national banking law, viz., section 5208, Rev. Stat. U. S., clearly indicated the purpose of Congress to make such checks valid. This contention deserves attention. Section 5208, Rev. Stat. U. S., makes it unlawful to certify any check, not, as provided in section 19, unless the amount actually stands to the credit of the drawer on the books of the bank, but unless the drawer "has on deposit * * * an amount of money equal to the amount specified in such check." Then follows the provision omitted from section 19: "Any check so certified by duly authorized officers shall be a good and valid obligation against the association." It will be observed that the language omitted in framing section 19, in form, at least, and possibly in reality (see 1 Morse, Banking [4th Ed.], § 414), makes the prohibited check valid, even though not in the hands of a *bona fide* holder. The omission of this sentence, therefore, in section 19, may well be attributed to some other purpose than the intent to make such checks void in the hands of a *bona fide* purchaser. We can well understand the reluctance of a legis-

lature to use language which, even by inference, made such checks valid in whosoever hands they might be.

It results from these views that the trial court erred in denying defendant the right to prove that it received this check after certification, on the day it was drawn, in the usual course of business, and paid full value therefor, without notice or knowledge of any infirmity, or of the fact that the account of the drawer was overdrawn.

The court has received unusual aid from the excellent arguments and briefs of counsel representing the parties interested in this litigation. Without such aid, we could not have reached so speedily a decision.

Judgment reversed, and new trial ordered.

MOORE, C.J., MONTGOMERY and HOOKER, JJ., concurred.
GRANT, J., did not sit.

WHERE HOLDER PROCURES CHECK TO BE CERTIFIED. § 190.

First Nat. Bank v. Leach (1873), 52 N. Y. 350.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendant, entered upon a verdict.

This action was brought upon a check drawn by defendant. The check was drawn upon the Ocean National Bank, was dated November 21st, 1871, for \$1,410, payable on the 12th December, 1871, to the order of James Dolby. It was delivered to the payee and discounted for him by plaintiff. At eleven o'clock A. M. of the 12th December, plaintiff caused the same to be presented to the drawee for certification, and it was certified as good. The drawer had at that time on deposit sufficient to pay the check, and the amount thereof was charged to him. Within an hour or two thereafter the Ocean National Bank, the drawee, suspended, and a receiver was appointed, who took possession afterward; upon the same day the check was presented for payment, and payment being refused, the same was duly protested.

Upon this state of facts the court directed a verdict for defendant, to which plaintiff's counsel duly excepted.

William F. Shepard, for the appellant.
Louis C. Waehner, for the respondent.

PECKHAM, J. The defendant drew the check in controversy, it was discounted by the plaintiff, and on the day it was due it was presented by plaintiff to the drawee, the Ocean Bank, for certification, was certified as good, and in the afternoon of the same day was presented for payment, which was refused, because between the time of its certificate and its second presentment the drawee, the Ocean Bank, had failed and gone into the hands of a receiver. Did this certification operate as a payment of the check as between these parties?

The theory of the law is, that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well regulated bank adopts this practice to protect itself.

The reason therefor is so strong that the law presumes it is adopted by the banks. (*Smith v. Miller*, 43 N. Y. 171; *Meads v. The Merchants' Bk. of Albany*, 25 id. 148; *The Farmers' & Mechanics' Bk. v. Butchers' & Drovers' Bk.*, 16 id. 125; *Merchants' Bk. v. State Bk.*, 10 Wall. 647.) It is found to have been done in this case.

If a bank failed to keep such account and to make such entries, it would necessarily incur the peril of the failure of its customers whose checks it certified, without any account of their number or amount, although it would be liable to pay its certified checks to *bona fide* holders, whether it had funds or not. (*Farmers' & Mech. Bk. v. Butchers' & Drovers' Bk.*, *supra*.)

It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check instead of making a certificate of its being good.

For that reason, the drawer could have no remedy against the bank, by any legal proceeding, to secure himself for the amount of that check. Hence, if the drawer should get the check back, he would strictly be entitled to get that money, not by virtue of its original deposit, but solely by surrender of the certified check, like any other holder.

But all that has been yet stated applies with equal force to the acceptance of a time bill of exchange before due. Then, when the drawee accepts, it is an appropriation of the funds, *pro tanto*, for the service and use of the payee or other person

holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. (Story on Bills of Ex., § 14; 1 Pars. on Notes and Bills, 323.)

It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft.

But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that check is good; we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it. The holder says no. I will not take the money; you may certify the check and retain the money for me until this check is presented.

The law will not permit a check, when due, to be thus presented and the money to be left with the bank for the accommodation of the holder, without discharging the drawer.

The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the statute of limitations.

The acceptance of a time draft before due is entirely different; there the holder has then no right to the money, and the acceptor no authority to pay until the maturity of the bill. There is no necessity for presenting a check for acceptance, like a time bill, no authority for such presentment, although the holder has the right to do it. The authority and the duty are to present for payment.

If, however, the holder choose to have it certified instead of paid, he will do so at the peril of discharging the drawer.

He cannot change the position and increase the risk of the drawer without discharging him. (*Smith v. Miller, supra.*)

This would not discharge the drawer of a check, who himself procured it to be certified and then put it in circulation. The reason of the rule fails to apply to him in such case.

I am not aware of any direct authority upon this question; but upon principle it must be held that the bank holds the money, after certification to the holder, not at the risk of the drawer, but of the holder of the check.

The judgment must be affirmed.

All concur.

Judgment affirmed.

WHERE DRAWER PROCURES CHECK TO BE CERTIFIED. § 190.

Minot v. Russ } (1892), 156 Mass. 458, 32 Am.
Head et al. v. Hornblower et al. } St. Rep. 472.

FIELD, C.J. The first case is an appeal from a judgment rendered by the Superior Court for the defendant, on his demurrer to the declaration. The defendant, on October 29, 1891, drew a check on the Maverick National Bank, payable to the order of the plaintiff, and, being informed by the plaintiff that the check must be certified by the bank before it would be received, the defendant on the same day presented the check to the bank for certification, and the bank certified it by writing on the face of the check the following: "Maverick National Bank. Pay only through Clearing-House. J. W. Work, Cashier. A. C. J., Paying Teller." After it was certified, the check was, on Saturday, October 31, 1891, delivered by the defendant to the plaintiffs, for a valuable consideration. The declaration alleges that the bank stopped payment on Monday morning, November 2, 1891, "before the commencement of business hours on said day," and that on that day payment was duly demanded of the bank, and notice of non-payment was duly given to the defendant.

The second case is an appeal from a judgment rendered for the defendants by the Superior Court, on an agreed statement of facts. On Saturday, October 31, 1891, the defendants drew their check on the Maverick National Bank, payable to the order of the plaintiffs, and delivered it to them in payment of stocks bought by the defendants of the plaintiffs. The check was received too late to be deposited by the plaintiffs for collection in season to be carried to the clearing-house on that day, but during banking hours on that day the plaintiffs presented the check to the Maverick National Bank for certification, and the bank certified it by writing or stamping on its face the following: "Maverick National Bank. Certified. Pay only through Clearing-House. C. C. Domett, A. Cashier. —, Paying Teller."

At that time the defendants had on deposit sufficient funds to pay the check, and the bank on certification charged to the defendant's account the amount of the check, and credited it to a ledger account called certified checks, in accordance with their uniform custom. After certification, the plaintiffs, on the same day, deposited the check in the Hamilton National Bank for collection. It is agreed that if the check had been presented

for payment on Saturday, in banking hours, it would have been paid; but the Maverick National Bank transacted no business after Saturday, and on Sunday the Comptroller of the Currency placed a national bank examiner in charge, and the bank was put into the hands of a receiver. The clearing-house on November 2 refused to receive checks on the Maverick National Bank, and the check was on that day duly presented for payment, and due notice of non-payment was given to the defendants.

Each of the checks was in the ordinary form of checks on a bank, and was payable on demand, and no presentment for acceptance or certification was necessary. In a sense, undoubtedly, a check is a species of bill of exchange, and in a sense also it is a distinct commercial instrument; but according to the general understanding of merchants, and according to our statutes, these instruments were checks, and not bills of exchange. "A check is an order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money; no previous notice is necessary, no acceptance is required or expected, it has no days of grace. It is payable on presentment and not before." *Bullard v. Randall*, 1 Gray, 605, 606. The duty of the bank was to pay these checks when they were presented for payment, if the drawers had sufficient funds on deposit. The bank owed no duty to the drawers to certify the checks, although it could certify them if it saw fit, at the request of either the drawers or the holders, and if it certified them it became bound directly to the holders, or to the persons who should become the holders. In either case, the bank would charge to the account of the drawer the amount of the check, because by certification it had become absolutely liable to pay the check when presented. When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But when the payee or holder of a check presents it for certification, the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the check instead of paying it. In one case the bank certifies the check for the use or convenience of the drawer, and in the other for the use or convenience of the holder. In the present case the checks were seasonably presented to the bank for payment, and on the

facts stated the defendants would be liable unless the certification discharged them from liability.

It is argued that the certification of a check, whereby the bank becomes absolutely liable to pay it at any time on demand, discharges the drawer, because it is said that the check then becomes in effect a certificate of deposit; and it is also argued that the certification is in effect only an acceptance of a bill of exchange, and that if payment is duly demanded of the bank and refused, and notice of non-payment duly given, the drawer is held. So far as the question has been considered, it has been decided that the certification of a bank check is not, in all respects, like the making of a certificate of deposit, or the acceptance of a bill of exchange, but that it is a thing *sui generis*, and that the effect of it depends upon the person who, in his own behalf, or for his own benefit, induces the bank to certify the check. The weight of authority is, that if the drawer in his own behalf, or for his own benefit, gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged. (*Born v. First National Bank*, 123 Ind. 78; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Andrews v. German National Bank*, 9 Heisk. 211; *First National Bank v. Leach*, 52 N. Y. 350; *Boyd v. Nasmith*, 17 Ont. 40; *Essex County National Bank v. Bank of Montreal*, 7 Biss. 193; *First National Bank v. Whitman*, 94 U. S. 343, 345; *Metropolitan National Bank v. Jones*, 27 N. E. Rep. 533; *Continental National Bank v. Cornhauser*, 37 Ill. App. 475; *National Commercial Bank v. Miller*, 77 Ala. 168; *Larsen v. Breene*, 12 Col. 480; *Mutual National Bank v. Rotge*, 28 La. An. 933; *Morse on Banking*, §§ 414, 415.) We are of opinion that this view of the law rests on sound reasons. If it be true that the existing methods of doing business make the use of certified checks necessary, the persons who receive them can always require them to be certified before delivery. If they receive them uncertified and then present them to the bank for certification instead of payment, the certification should be considered as discharging the drawer.

It may also be said, that in the second case the certification amounted to an extension of the time of payment at the request of the payees, without the consent of the drawers. Before the certification the drawers could have requested the payee to present the check for payment on Saturday, or could themselves have drawn out the money and paid the check. After certifica-

tion the amount of the check no longer stood to the credit of the drawers, and the payees had accepted an obligation of the bank to pay only through the clearing-house, which could not happen before the following Monday. The result is that in the first case the judgment is reversed, and the demurrer overruled, and in the second case the judgment is affirmed.

So ordered.

F. Brewster, for the plaintiff in the first case.

F. R. Jones, for the defendant in the first case.

W. C. Loring, for the plaintiffs in the second case.

C. A. Williams, for the defendants in the second case.

CONTRACT OF THE DRAWER WHEN HE DRAWS ON HIMSELF.

§§ 63, 116—I.

Fairchild v. Ogdensburgh R. R. Co. (1857), 15 N. Y. 337, 69
Am. Dec. 606.

Appeal from a judgment of the Supreme Court in favor of the plaintiff. The action was upon certain orders for the payment of money, the contention for the defense being that the instruments were bills of exchange and were not enforceable without proof of presentment to the drawee, demand of payment and refusal. Other facts are stated in the opinion.

T. Jenkins, for the appellant.

J. H. Reynolds, for the respondent.

DENIO, C. J. The complaint contains a distinct averment of an indebtedness by the defendant to the plaintiffs, for work and labor to an amount equal to the sum claimed. The paper which it is alleged was given for this indebtedness was not a bill of exchange. The idea of a bill, under the law merchant, supposes the existence of a party other than the drawee, to whom the bill is addressed, and who is therein requested to pay the amount to the holder on account of the drawer. Here the party with whom the plaintiffs dealt was the corporation which, being an artificial person, could only act by agents. The president was one agent, and the treasurer was another, and as a convenient method of keeping the accounts, the former, whose duty it was to adjust the claims for labor, made his warrant in favor of the plaintiffs on the treasurer, who was entrusted with the duty of

keeping the money and paying it out on proper vouchers. Both the drawee of the order and the party to whom it was addressed represented the corporation; and neither incurred, or were expected to incur, any personal obligation. The default of either, in performing any duty respecting the order, would be the default of the corporation, and would not subject either of them to any individual liability. The giving of the order for the debt of the corporation, was a method suggested by motives of convenience for transacting its business and keeping its accounts. To require of the holder of such a draft, the kind of diligence which the law exacts of the holder of commercial paper, would be a perversion of its object. It is argued by the defendant's counsel, that the plaintiffs having taken a draft on the defendant's treasurer, for his debt, they must be understood to have assented to their forms of doing business, and should be holden to make a presentment of the draft before suing the company. It would certainly be wrong to allow the creditor in such a case to subject the company to costs, when the funds are ready, and when the money would be paid upon the presentation of the paper. But the answer to the argument is, that the creditor will be defeated in his action, as to damages and costs, if the company are able to show that its treasurer was furnished with funds, and would have paid the demand if he had been called on. It becomes, then, a question as to the *onus probandi*. In *Wolcott v. Van Santvoord*, 17 John. 248, it was settled, upon much consideration, that in an action against the acceptor of a bill, or the maker of a note, payable at a particular place, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed. This has been considered the unquestioned law ever since the judgment in that case, a period of nearly forty years. After such an acquiescence in a principle of such constant application, and which relates to the most practical of subjects, the effect of commercial paper, we cannot listen to the suggestion of the defendant's counsel, that the prior cases in England are the other way. If, upon examination, we found them to be so, we should not depart from the rule as we find it settled and universally acted on in this state. The drafts which the plaintiffs received for their debt against this corporation, are in the nature of promissory notes, payable at the office of the treasurer of the company. Though in the form of bills, they contain an acknowledgment in writing of their indebtedness to the plaintiffs in the amounts mentioned in them, and an undertaking, in effect, to pay these amounts at the treasurer's office. In *Miller v. Thomson* (3

Manning & Gr., 576), the Court of Common Pleas, in England, determined that an instrument in the form of a bill of exchange, drawn upon a joint stock bank, by the manager of one of its branches, by order of the directors, might be declared upon as a promissory note. The chief justice said there was the absence of the circumstance of there being two distinct parties, as drawer and drawee, which, he said, was essential to the constitution of a bill of exchange. That being so, he added, the only alternative is that this instrument is a promissory note, and is properly declared upon as such. We adopt the principle of this case, which is strictly applicable to the one before us. The issue, therefore, which was joined upon the question whether these orders had been presented for payment, was an immaterial one, and the Supreme Court was right in its judgment.

SHANKLAND, J., delivered an opinion to the same effect, and all the judges concurred, except COMSTOCK and BROWN, who not having heard the argument took no part in the decision.

Judgment affirmed.

CONTRACT OF DRAWER AS EXECUTOR OR TRUSTEE OF DRAWEE'S
ESTATE. §§ 63, 116—3.

Caunt v. Thompson (1849), 7 M. G. & S. 400, 62 E. C. L. 399.

CRESSWELL, J., now delivered the judgment of the court.

This was an action of assumpsit by the endorsee, against the drawer, of a bill of exchange.

The declaration alleged that the bill was drawn by the defendant on J. Whitley, payable to the order of the drawer two months after date, that the bill was accepted by Whitley, and endorsed by the drawer to Tomlin, and by Tomlin to the plaintiff, and that the bill, when due, was presented to Whitley, and dishonoured, of which the defendant had notice.

The defendant pleaded,—first, that the bill was not duly presented to Whitley,—secondly, that the defendant had no notice of the dishonour of the bill.

At the trial before Wilde, C. J., at the sittings in Middlesex after Michaelmas term, 1847, it appeared in evidence, that, before the bill became due, the acceptor died, having made the defendant (the drawer) his executor, and that he had proved the will; that, when the bill became due, the plaintiff sent one of the witnesses

to the house of the acceptor, to present the bill; that the witness there saw the defendant, to whom he presented the bill, saying,—“I have brought a bill from Caunt’s: you know what it is;” and that thereupon the defendant said,—“I am executor of Whitley: you must persuade Caunt to let the bill stand over a few days, because Whitley has only been dead a few days: I shall see the bill paid.”

Upon this evidence, the plaintiff applied for leave to amend his declaration, by averring the death of the acceptor, the appointment of the defendant as his executor, and the presentment of the bill to him.

The lord chief justice allowed the amendment to be made, and said that the proof of presentment to the executor was not sufficient proof of notice of dishonour.

A verdict was thereupon taken for the plaintiff on the first issue, and for the defendant on the second; leave being reserved to the plaintiff to move to enter a verdict on that issue in his favour, or for judgment *non obstante veredicto*; and leave being likewise reserved to the defendant to move on the ground that the amendment ought not to have been made.

Cross rules were accordingly obtained in Hilary term, 1848.

At the argument, we disposed of the defendant’s rule, thinking the amendment properly allowed: and now, after consideration, we think that the plaintiff’s rule, to enter a verdict in his favour on the second issue, must be made absolute.

It may be assumed to be a settled rule, that knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. Pothier, *Contrat de Change*, Part I. c. 5, § 147, (citing Savary, parer. 45) lays down the same rule with reference to foreign (“Foreign” as opposed to “English,” not as opposed to “inland”) bills, viz., that the notorious insolvency of the acceptor of a bill does not dispense with protest for non-payment, and notice to the prior parties, because the insolvency of the acceptor, however notorious, may not be known to them, or, in the absence of notice, they may suppose that the acceptor, though insolvent, has found means to take up the bill. So also it may be considered as settled, that information that a bill has been dishonoured, derived from a person not having authority to give it, does not supply the place of notice. Hence it has become usual to say that *knowledge* of the dishonour of a bill is not equivalent to *notice*. In such cases as those above mentioned, it certainly is not.

The law has not been so well settled as to the nature of the

notice to be given. In *Hartley v. Case*, 4 B. & C. 339, Abbott, C. J., said: "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange; but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." Since that case was decided, there has been some fluctuation of opinion on the subject. In *Solarte v. Palmer*, 7 Bingh. 530, 5 M. & P. 475, 1 Tyrwh. 371, 1 C. & J. 417, which was finally decided in the House of Lords (1 N. C. 194, 1 Scott 1, 8 Bligh. N. S. 874), a very strict rule was adopted; but that has not been adhered to. In *Burgh v. Legge*, 5 M. & W. 418, Parke, B., says: "There must be proof of a notice given from some party entitled to call for payment of this bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence." But, in *Furze v. Sharwood*, 2 Q. B. 388, and *King v. Bickley*, 2 Q. B. 419, it was decided that the notice need not, in terms, inform the party to whom it is given, that he is looked to for payment: and, in *Miers v. Brown*, 11 M. & W. 372, these latter decisions were followed.

The rule does not differ in substance from that given by Ashhurst, J., in *Tindal v. Brown*, 1 T. R. 167:—"Notice means something more than *knowledge*; because it is competent to the holder to give credit to the maker. (The action was on a promissory note.) It is not enough to say that the maker does not intend to pay, but that he, the holder, does not intend to give credit." In substance, these cases seem to establish, that, in order to make a prior holder responsible, he must derive, from some person entitled to call for payment, information that the bill has been dishonoured, and that the party is in a condition to sue him, from which he may infer that he will be held responsible. In *Miers v. Brown*, Alderson, B., describes what is needful, in these terms: "Knowledge of the dishonour obtained from a communication by the holder of the bill, amounts to notice."

In the present case, the defendant knew that the bill was dishonoured; and he knew it from the best source, namely, his own personal act in dishonouring it when presented by the holder: and he knew, from the same source, that time had not been given to the acceptor. He had, therefore, all the information which, according to Ashhurst, J., the notice ought to convey: and, knowing that, he would know also that the holder had placed himself in a situation to call upon him (the drawer) for payment, from which,—to adopt the view of modern decisions,—he might infer that he would be called upon. This is very different from that

knowledge which has been spoken of as not equivalent to notice, and is at least as much notice as the knowledge spoken of by Alderson, B., in *Miers v. Brown*. Indeed, there would be some absurdity in requiring that the plaintiff should have stated to the defendant at the time when he dishonoured the bill, "Take notice that this bill has been dishonoured by you." Lord Ellenborough seems to have been of that opinion in the case of *Porthouse v. Parker*, 1 Camp. 82, an action by the payee against the drawer of a bill. It was drawn by one Wood as agent of George James and John Parker, upon John Parker. There was no proof that Wood had authority to draw: but evidence being given that the bill was accepted by a duly-authorized agent for John Parker, Lord Ellenborough held that it was evidence of the bill having been regularly drawn; and that, the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of the bill, as this must necessarily have been known to one of them; and the knowledge of one was the knowledge of all.

Upon the authority of that case, and upon principle, we think that the notice to the defendant in this case was established, and that the verdict should be entered for the plaintiff on the issue on the second plea.

Plaintiff's rule absolute.

Defendant's rule discharged.

CONTRACT OF DRAWER WITHOUT RIGHT TO EXPECT ACCEPTANCE.
§ 116—4.

Cathell v. Goodwin (1827), 1 H. & G. (Md.) 468.

Assumpsit on an instrument, of which the following is a copy:

Mr. Jno. Gooding—

Pay to the order of Mrs. Cathell five hundred dollars and charge the same to your ob. st. ROBT. M. GOODWIN.
\$500, June 24th, 1818.

Verdict and judgment for the defendant.

Plaintiff appealed.

DORSEY, J., at this term delivered the opinion of the court. To support the opinion of the court below, the appellee's counsel have relied on three positions, (either of which, if tenable, would be

sufficient for their purpose) viz., 1. That Mrs. Matilda Cathell was not competent to demand payment of the bill. 2. That she consented to receive a conditional acceptance, and thereby gave time to the acceptor. 3. That the drawer had reasonable grounds to expect that his bill would have been honoured.

There is nothing to sustain the *first* position. The defendant has in express terms, authorised Mrs. Cathell to receive the amount of the bill. To deny her the right to demand it, would be sanctioning an absurdity for the mere purpose of working injustice.

The *second* position is equally untenable. The facts stated in the bill of exceptions would not have warranted the jury in finding Mrs. Cathell's acceptance of a conditional acceptance of the bill, much less are they of that conclusive, resistless character which would authorise the court to assume the fact, to the ascertainment of which a jury only were competent.

The *third* position was that most obstinately contended for, which was conceived to be impregnably forfeited by that part of the rule established in *Eichelberger v. Finley & Van Lear*, 7 Harr, & Johns. 381, which dispenses with notice only where *the drawer had no reasonable grounds to expect that his bill would be honoured*. The reasonableness of such expectation is matter for the court, and not for the jury, to decide. If the facts, upon which the question arises, be admitted or be undeniable, then the question becomes exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal or contradictory, then it becomes a mixed question both of law and fact, in which case, the court hypothetically instruct the jury as to the law, to be by them pronounced accordingly as they may find the facts. What are the facts to be found in this case justifying the drawer's expectation that his draft would have been paid? So far from having funds in the drawer's hands, he was his debtor—no proof of such a commercial intercourse between them as would imply a mutual credit—no previous promise by the drawee to accept this or any other draft for the drawer's accommodation—no consignment of goods to the drawee, which the drawer had any reason to expect would be received in time to meet his bill, but the only proof is, that the drawee informed the payee, that he expected funds of the drawer would shortly come to his hands, with which, when received, he would pay. That funds afterwards did arrive, but whether in one month, or five years after, does not appear. What may have been the expectations of the drawee, as to the receipt of funds from the drawer,

is immaterial; they are not even admissible evidence in this cause. But if they were, they can have no influence on those of the drawer—into whose expectations only is the enquiry to be made. The facts in the cases of *Legge v. Thorpe*, 12 East, 170, and *Claridge v. Dalton*, 4 Maule & Selw. 226, afford much stronger evidence of a reasonable expectation in the drawers that their bills would be honoured, than those in the present case; yet there they were adjudged insufficient. The “reasonable grounds” required by law are not such as would excite an idle hope, a wild expectation, or a remote probability, that the bill might be honoured, but such as create a full expectation, a strong probability of its payment; such indeed as would induce a merchant of common prudence and ordinary regard for his commercial credit, to draw a like bill. The facts in this case constitute no such reasonable grounds. We therefore think that the county court erred in instructing the jury that the plaintiff was not entitled to recover, and consequently reverse their judgment.

Judgment reversed, and procedendo awarded.

SEC. VI.—OF NEGOTIATION IN GENERAL.

INDORSEMENT AND DELIVERY.

§ 32.

Geary v. Physic (1826), 5 B. & C. 234; 11 E. C. L. 442.

Assumpsit by the plaintiff as indorsee against the defendant as maker of a promissory note for the sum of 30*l.* payable two months after date to the order of one Folder, and indorsed by him, Folder, to one Kemp, who subsequently indorsed the note to the plaintiff. At the trial before Abbott, C. J., at the London sittings, after Hilary term, 1825, it appeared that the indorsement by Kemp, to the plaintiff was in pencil, and it was thereupon objected that the plaintiff could not recover; an indorsement in *pencil* not being such an indorsement as the law and custom of merchants recognizes to be sufficient to pass the interest in a bill of exchange, and promissory notes being by the statute 3 & 4 Ann. c. 9, s. 1, assignable or indorsable in the same manner as unpaid bills of exchange are according to the custom of merchants. The Lord Chief Justice, thought it sufficient, and directed the jury to find a verdict for the plaintiff, reserving liberty to the defendant's coun-

sel to move to enter a non-suit, if the court should be of opinion that the indorsement of the promissory note in pencil, was not a good and valid indorsement. *F. Pollock*, in last Easter term, obtained a rule *nisi* to enter a nonsuit.

Thesiger, now showed cause.

ABBOTT, C. J. There is no authority for saying that where the law requires a contract to be in writing, that writing must be in ink. The passage cited from Lord Coke, shows that a deed must be written on paper or parchment, but it does not show that it must be written in ink. That being so, I am of opinion that an indorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent its being generally adopted. There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an indorsement of bills of exchange should be in writing (see the custom stated in *Lutwidge*, 878), without specifying the manner with which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff.

BAYLEY, J. I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials.

HOLROYD, J., concurred.

Rule discharged.

Brown v. The Butchers' & Drovers' Bank (1844), 6 Hill (N. Y.)
443.

On error from the superior court of the city of New York, where the Butchers & Drovers' Bank sued Brown as the endorser of a bill of exchange, and recovered judgment. The endorsement was made with a lead pencil, and in figures, thus, "1. 2. 8.," no name being written. Evidence was given strongly tending to show that the figures were in Brown's handwriting, and that he meant they should bind him as endorser; though it also appeared he could write. The court below charged the jury that, if they believed the figures upon the bill were made by Brown, as a substitute for his proper name, intending thereby to bind himself as endorser, he was liable. Exception. The jury found a verdict for the plaintiffs below, on which judgment was rendered, and Brown thereupon brought error.

C. De Witt, for the plaintiff in error.

A. Schell, for the defendants in error.

By the court, NELSON, Ch. J. It has been expressly decided that an endorsement written in pencil is sufficient; (*Geary v. Physic*, 5 Barn. & Cress. 234;) and also that it may be made by a mark. (*George v. Surrey*, 1 Mood. & Malk. 516). In a recent case in the K. B. it was held that a mark was a good signing within the statute of frauds; and the court refused to allow an enquiry into the fact whether the party could write, saying that would make no difference. (*Baker v. Dening*, 8 Adol. & Ellis, 94; and see *Harrison v. Harrison*, 8 Ves. 186; *Addy v. Grix*, id. 504).

These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself.

Judgment affirmed.

Day v. Longhurst (1893), Ch. Div. 41 W. R. 283.

Motion.

This was a motion to commit the defendant Longhurst and his solicitor, Young, for contempt of court.

On the 1st of July, 1892, an order was made in this action restraining the defendant over the 8th of July from "negotiating,

pledging, or disposing of" certain bills of exchange. This *interim* order was from time to time continued down to the 22nd of November, 1892. Previously to the commencement of the action the bills in question (which were payable to the defendant's order) had been deposited by him with Young by way of security for a debt, but had not been indorsed, and they had since continued in Young's possession. On the 5th of October, 1892, while the *interim* order was in force, the defendant, at the request of Young, indorsed one of them; and the motion to commit the defendant and his solicitor for contempt of court was thereupon made.

The Bills of Exchange Act, 1882, provides, as follows:—

Section 2.—“Bearer” means the person in possession of a bill or note which is payable to bearer. “Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

Section 31 (1).—A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. Sub-section (3).—A bill payable to order is negotiated by the indorsement of the holder completed by delivery. Sub-section (4).—Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee, in addition, acquires the right to have the indorsement of the transferor.

Hastings, Q.C., and *Swinfen Eady*, for the plaintiff.

Buckley, Q.C., and *Lewis Edmunds*, for the respondents.

STIRLING, J., after referring to the definition of “bearer” and “holder” in the Bills of Exchange Act, 1882, s. 2, continued:—Previously to the 5th of October, 1892, Young was neither “bearer” nor “holder” of the bills in question. The former term applies only to the person in possession of a bill or note payable to bearer, which this was not, and the latter to a payee or indorsee of a bill or note, which Young was not. [His lordship then read section 31, sub-sections 1 and 3, and said:—] Previously to the 5th of October, 1892, the bill had not been transferred to Young so as to constitute him the holder of the bill, for he was not “payee” or “indorsee,” therefore the bill was not up to that date negotiated. On the 5th of October, 1892, the bill, being in the possession of Young, was for the first time indorsed by the defendant. Young, who up to that time had been merely the transferee of the bill, now for the first time became the “holder” of it within

the meaning of the Bills of Exchange Act, and the bill was for the first time "negotiated" within the meaning of sub-section 1 of section 31; consequently the defendant by his act on the 5th of October, 1892, converted Young from a mere transferee into a holder of the bill, and, in my opinion, negotiated the bill, contrary to the *interim* order which had been made.

On behalf of the respondents reliance was placed on sub-section 4 of section 31. No doubt that sub-section shows that Young had, prior to the 5th of October, 1892, the right to have the indorsement of the defendant, and, consequently, to sue the defendant if he refused to indorse the bill. That, however, did not justify the defendant in violating the order of the court. If proceedings were taken or threatened by Young, the defendant ought to have applied either that the injunction might be removed, so as to enable him to give effect to Young's rights, or else to have Young made a party to the action. The latter alternative, however, the defendant actually declined, in the course of the hearing of the motion. In my opinion the defendant has violated the order of the court. I do not, however, regard the case as one of serious contempt, and as regards costs I think justice will be met if I order the defendant to pay those of the applicant and leave Young to pay his own.

Motion dismissed.

IRREGULAR FORMS OF INDORSEMENT.

§ 33.

Markey v. Corey (1895), 108 Mich. 184, 36 L. R. A. 117, 62 Am. St. Rep. 698.

Error to Wayne; Lillibridge, J.

Assumpsit by Matthew M. Markey and Catherine Sundars against Lorenzo Corey, impleaded with George H. Waldo and Alden M. Varney, on a promissory note. From a judgment for plaintiffs, defendant brings error. Affirmed.

Edgar Weeks (*Moore & Moore*, of counsel), for appellant.
Ervin Palmer, for appellees.

LONG, J. Defendant Corey entered into a written contract with Waldo and Varney for the sale of certain personal property at the sum of \$2,500, payable \$200 the first year, \$500 the second, and \$600 each year thereafter, until the whole amount should be

paid, according to five promissory notes executed at the same time. The contract also provided that certain stock should be deposited by the purchasers as further security for the payments. It was then provided:

"But in case said payments shall not be made as above provided, and in case either or any of said payments shall remain unpaid for the period of 90 days, then the party of the first part shall, at his option, have the right to declare the whole remaining amounts represented by said notes to have become due and payable."

On the face of each of the promissory notes was written:

"This note is given in accordance with the terms of a certain contract under the same date, between the same parties."

Subsequently the plaintiffs received from defendant Corey an assignment of all his right, title, and interest in and to the contract, stock, and notes. On the back of the note in suit was indorsed:

"I hereby assign the within note to Matthew M. Markey and Catherine Sundars."

This \$500 note was not paid, and was protested, and the plaintiffs brought this suit upon it against Waldo and Varney as makers, and Corey as indorser. The declaration was upon the common counts in *assumpsit*, with a copy of the note attached. On the trial, however, the court permitted the plaintiffs to amend the declaration by averring the assignment of the contract and note. The case proceeded to trial, and plaintiffs' counsel offered in evidence the note and indorsement of assignment on it, together with the certificate of protest. Defendant's counsel objected to their introduction as against defendant Corey, claiming (1) that the note in question was not a promissory note, and that plaintiffs could not recover upon it against Corey as indorser, but that, if they took any title to it, it was under the assignment; (2) that the contract was evidenced by the note and the other writing,—the contract of sale. Plaintiffs' counsel then put in evidence, under objection, the contract of the sale. The court thereupon directed a verdict in favor of plaintiffs for the amount of the note and interest, from which judgment defendant Corey alone appeals.

It is insisted here, by counsel for defendant Corey:

1. That, if the plaintiffs took title to the note, it was under the assignment, and that, therefore, they could not sue in their

own names, but, if they had a right of action, it must be brought in the name of the original party to the contract.

2. That the two papers must be taken as constituting the contract, and that the note was not, therefore, a promissory note.

3. That Corey, by making the assignment to the plaintiffs, was not the indorser of the note, and could not be held liable as such.

The usual mode of transfer of a promissory note is by simply writing the indorser's name upon the back, or by writing also over it the direction to pay the indorsee named, or order, or to him or bearer. An indorsement, however, may be made in more enlarged terms, and the indorser be held liable as such. In *Sands v. Wood*, 1 Iowa, 263, the indorsement was, "I assign the within note to Mrs. Sarah Coffin." In *Sears v. Lantz*, 47 Iowa, 658, the indorsement on the note was, "I hereby assign all my right and title to Louis Meckley." And in each case the party so assigning was held as indorser, the court in the latter case saying of *Sands v. Wood*: "He used no words that, in and of themselves, indicated that he had bound or made himself liable in case the maker, after demand, failed to pay the note. But it was held the law, as a legal conclusion, attached to the words used the liability that follows the indorsement of a promissory note." See, also, *Duffy's Adm'r v. O'Connor*, 7 Baxt. 498; *Shelby v. Judd*, 24 Kan. 166; *Brotherton v. Street*, 124 Ind. 599.

The rule of the American cases is well stated in Daniel on Negotiable Instruments (section 688c) as follows:

"The question arising in such cases is a nice one, and depends upon rules of legal interpretation. The mere signature of the payee, indorsed on the paper, imports an executed contract of assignment, with its implications, and also an executory contract of conditional liability, with its implications. The assignment would be as complete by the mere signature as with the words of assignment written over it. The conditional liability which is executory is implied by the executed contract of assignment, and the signature under it, which carries the legal title; and the question is, does the writing over a signature an express assignment, which the law imports from the signature *per se*, exclude and negative the idea of conditional liability, which the law also imports if such assignment were not expressed in full? We think not. * * * When the thing done creates the implication of another to be done, we cannot think that the mere expression of the former in full can be regarded as excluding its consequence, when that consequence would follow if the expression were omitted."

The language used in the assignment to the note in suit does not negative the implication of the legal liability of the assignor as indorser, and as the words are to be construed, as strongly as their sense will allow, against the assignor, he must be held as indorser. This rule is fully supported in *Hatch v. Barrett*, 34 Kan. 230. See, also, *Adams v. Blethen*, 66 Me. 19.

In the case of *Aniba v. Yeomans*, 39 Mich. 171, the assignment read as follows: "I hereby transfer my right, title, and interest of the within note to S. A. Yeomans." Mr. Justice Marston said in that case:

"The right or interest passing, therefore, under the usual and customary indorsement, is much greater than the mere right, title, and interest of the payee; and where the transfer, as made, only attempts to pass the title and interest of the payee of the note, no greater right or interest than he then held can pass."

In other words, the learned justice seemed to think that the words used limited the transfer to the right and title he then held. While this holding appears to be at variance with the cases elsewhere, we think it readily distinguishable from the present, as here the words are, "I hereby assign the within note to Matthew M. Markey and Catherine Sundars," and do not purport to limit the liability of Corey as an indorser.

In *Stevens v. Hannan*, 86 Mich. 307, the note sued upon was negotiable in form, and made payable to Batchelder, and he assigned it before maturity, as follows: "For value received, I hereby assign all interest in and to this note to Ralph E. Watson." Defendant insisted in that case that the plaintiff could not sue in his own name, but should have sued in the name of the payee. It was said by Justice McGrath: "I do not think the point is well taken. * * * If Batchelder's indorsement did not affect its negotiability, then Watson's indorsement entitled the plaintiff, as holder of the note, to sue in his own name."

It must be held, therefore, that the memorandum on the note did not relieve Corey from his liability as indorser.

The court was not in error in admitting the contract in evidence, as its purpose was to show that the note was not in fact limited by its provisions, and those provisions of the contract cited did not destroy the negotiability of the note. (*Daniel Neg. Inst.*, § 48).

The judgment must be affirmed.

The other justices concurred.

Spencer v. Halpern (1896), 62 Ark. 595, 36 L. R. A. 120.

W. J. Mayo, N. W. Norton, and J. M. Prewitt, for appellant.
M. J. Manning, for appellee.

The facts are sufficiently stated in the opinion.

Wood, J. Appellant made the following indorsement on two promissory notes held by him, viz.: "For value received I hereby transfer my interest in the within note to Isaac Halpern. (Signed) Geo. Spencer." The maker having failed to pay at maturity upon demand, is appellant bound as indorser after due notice?

Where a negotiable instrument is indorsed in blank, or in full, the indorser contracts to pay the amount called for by the instrument if it is not paid by the principal on demand at maturity, provided notice of demand and non-payment is duly given. He also contracts that the instrument is genuine, that it is valid, that the parties are competent to make it, and that he has the title and right to transfer it. (1 Dan. Neg. Inst., sec. 669a; Tiedeman, Com. Paper, sec. 259). These rights of the indorsee and obligations of the indorser, under an indorsement in blank or in full in the common form, are not expressed, but fixed by implication, under the rules of the law merchant; and when there is such an indorsement, there is nothing for construction. But when the indorsement is in irregular form, and the contract is expressed, it may become, says Mr. Daniel, "a nice question for legal interpretation." But we cannot agree to his interpretation that an indorsement containing an express assignment of "my interest" over one's signature does not "exclude and negative the idea of conditional liability, which the law also imports, if such assignment were not expressed in full." (1 Dan. Neg. Inst., sec. 688c). That would be true only if the effect of the signature *per se* did nothing more than transfer the *interest* of the signer. But, as we have seen, the indorsement in blank not only transfers the title and interest of the indorser in the instrument, but it does more. It confers the absolute title upon the indorsee, and gives him rights against the maker which the payee himself might not have, and imposes upon the signer all the legal obligations of an indorser mentioned *supra*. (*Aniba v. Yeomans*, 39 Mich. 171).

We fail to see the application of the maxim "*Expressio eorum quae tacite insunt nihil operatur*" in a case where all the implications of the law following an indorsement in blank, or in full, in the regular form, are not expressed. On the contrary, it seems

clear to us that the payee, by expressing one only of the implications which the law attaches to an indorsement in blank or in full, in the regular way, and that one, too, not imposing any personal liability upon him, excludes every other. And the maxim "*Expressio unius*," etc., does apply. (*Hailey v. Falconer*, 32 Ala. 536).

In Michigan the indorsement was "I hereby transfer my right, title, and interest of the within note to S. A. Yeomans," signed by the payee. The Supreme Court held that such an indorsement gave the transferee the same rights that the payee had, "but none other or greater." (*Aniba v. Yeomans*, 39 Mich., *supra*). Mr. Tiedeman says: "The declaration that the payee assigns or transfers all his *right, title and interest* in the paper would seem to limit in a most effective way the rights acquired by the transferee to those which the transferrer had therein, and thus prevent the writing from operating as an indorsement." (Tiedeman, Com. Paper, sec. 265).

To avoid the necessity for construction, and the probability of misconstruction, it would always be better for the one desiring to escape the liabilities of an indorser to add the words "without recourse." But the question here is not what the appellee *should* have done, but what did he *actually do*? Why should we not let the contract mean and have the effect that is plainly expressed by the terms "*my interest*" in their ordinary acceptation?

Had the payee intended to be bound as indorser, why use so many words? Had the transferee expected more than the "*interest*" of the transferrer, why did he accept the instrument transferring only his "*interest*?" We must accept and interpret the completed contract as the parties made it. They have seen proper to express it at length, and have used unambiguous terms. Construing the terms "*my interest*" most strongly against the transferrer, we do not feel authorized to say they mean anything more than simply "*my interest*." They are clearly terms of *limitation*, when used in an indorsement on a negotiable instrument. Compare *Reynolds v. Shaver*, 59 Ark. 299.

Counsel for appellee cite us to cases which seem to hold the contrary, but we find in some of these the language of the indorsement is different from that under consideration, and, where similar, the cases are not satisfactory. With due respect to these, and to Mr. Daniel, we must conclude that their conclusions are illogical, and the doctrine they announce unsound.

Reversed and remanded, with directions to sustain the demurrer to appellee's set-off.

BATTLE, J., absent.

INDORSEMENT MUST BE OF ENTIRE INSTRUMENT.

§ 34.

Hughes v. Kiddell (1801), 2 Bay (S. C.) 324.

Motion for a new trial.

This was an action against defendant as endorser on a note of hand, in which there was a verdict for defendant. The note of hand in question was given by David Bush, of Camden, to the defendant Kiddell, for 473*l.* sterling. Kiddell afterwards made the following endorsement, viz.: "I assign over to Hudson Hughes, the sum of 1,930 dollars and 50 cents, as part of this note of hand.

"Signed,

"BENJAMIN KIDDELL."

Afterwards he made another endorsement, and assigned over the residue of said note. (Signed, BENJAMIN KIDDELL.)

Mr. Ford, for the motion, contended, that both these endorsements ought to be taken together, and considered as one endorsement, as it appeared to be one transaction, done at the same time, on the same day, and made to the same person. He admitted, that an endorsement of part was not good, but that the two parts in this case, to the same person, made the whole good; and as such, the court was bound to give it a reasonable and liberal construction, as it would not subject the party to different actions; which was the reason, why the law of merchants would not admit of the splitting up contracts, and allow of different endorsements on bills and notes.

Mr. Pringle, in reply, contended, that from the very nature of the transaction, it must have been the intention of the defendant to restrain the negotiability of this note, as well as to exempt himself from responsibility; taking these endorsements either severally or jointly, they amount to no more than a bare authority to receive the money, or a relinquishment of the defendant's right to the note. It is not expressed for value received, so as to raise an implied assumption at law; but the law is clear that an endorsement for part is bad. (Bailey on Bills, 34).

For if it were allowable for a man to endorse for part, he might endorse 100 dollars to A, another 100 to B, and so on; and by that means, defendant might become liable to twenty different actions on the same bill. For these reasons, and to guard against this monstrous inconvenience, the law of merchants has established it as a rule, that a bill cannot be endorsed for part. (Cunn. on Bills, 57).

Now it is clear, from the gentleman's own acknowledgment, that the first endorsement for 1,930 dollars and 50 cents in part, is bad *ab initio*; and if so, then the subsequent endorsement for the residue never can give the first, legal validity; as it is most evident to reason and common sense, that two vitious or bad endorsements can never constitute a good whole endorsement.

The court, after hearing the arguments, refused to grant a new trial, on the ground that an endorsement for part of a note or bill is bad. (*Lex Mercatoria*, 445; *Carth.* 466). And if so then two vitious endorsements can never constitute a good one.

Rule discharged.

Present, GRIMKE, WAITES, BAY and JOHNSON.

INSTRUMENT INDORSED IN BLANK AND LATER INDORSED SPECIALLY.

§ 36.

Habersham v. Lehman (1879), 63 Ga. 380.

Lehman brought complaint against Habersham on a note for \$300.00 payable to the order of Eppinger & Russell, dated June 12th, 1878, and due at ninety days. It was indorsed as follows: "Eppinger & Russell, by A. Cyraix, Attorney." "Pay C. H. Dexter, cashier, or order, for collection on account of Atlanta Savings Bank of Georgia. (Signed) Lodovick J. Hill, Cashier." The defendant pleaded the general issue, and specially the following facts: The note sued on was fraudulently procured from defendant in place of a non-negotiable note previously given by him to the payees for certain improvements made on property of his rented by the payees. At the time said payees obtained the first note from defendant, a distress warrant against them in his favor for \$400.00 was pending, for the rent of certain wharf property. The said note was given for improvements placed by the payees upon this property, it being agreed that it should remain in the hands of the payees until the termination of the litigation on the distress warrant, so that if they were held liable for the rent they could apply it in part payment of the judgment which would be obtained. It was contracted that in no event should they transfer the note, and to secure this end it was made non-transferable. The litigation arising on the distress warrant is still pending; but said payees, tired of keeping their contract, came to defendant, and, by fraud, obtained the note sued on in place of the first, and immediately transferred it to the plaintiff.

Defendant further says that the plaintiff is only an agent of the payees, who are thus seeking to avoid their contract under the willing complicity of plaintiff as an innocent and *bona fide* holder.

When the plaintiff offered the note sued on in evidence, objection was taken on the ground that it showed no title out of Eppinger & Russell, unless a power from them to "A. Cyraix, attorney," be shown; and further, that the second indorsement showed the note to be the property of the Atlanta Savings Bank. The objections were overruled and defendant excepted.

Mr. Goodyear, of counsel for plaintiff, testified to the following facts: In taking the first note defendant remarked that he desired it made with time enough to reach over the approaching May term of the court when the distress warrant would be tried. Witness supposed it to be a negotiable note, and under this impression delivered it to Russell, one of the payees. A few weeks after, he returned it to witness and said he could do nothing with it as it was not negotiable, though given as negotiable paper. Witness told him that he had no doubt it was an oversight of defendant's, and he would undertake to procure a negotiable instrument in its place. Defendant wanted additional time, so witness drew the note sued on at three months and defendant signed it. He had full opportunity to read it. The first note was destroyed. The plaintiff had no knowledge of the conversations or transactions referred to.

The jury found for the plaintiff. The defendant moved for a new trial on the following grounds:

1st. Because the verdict was contrary to law and evidence.

2d. Because the court refused to charge as follows: "If the jury find, from an inspection of the note, an indorsement of the original payees' names, and also the following indorsement: 'Pay to the order of C. H. Dexter, Esq., cashier, for collection on account of Atlanta Savings Bank of Georgia. (Signed) Lodovick J. Hill, Cashier,' and found no other indorsement on the note, then the note without further evidence, would be presumed to be the property of the said Atlanta Savings Bank and the plaintiff could not recover from the defendant."

3d. Because the court erred in charging that when a plaintiff in this class of cases, introduces a promissory note in evidence, he is entitled to recover unless the defendant introduces evidence to rebut the *prima facie* case thus made out.

4th. Because the court overruled the objections to the introduction of the note sued on, as stated above.

5th. Because the court charged the jury that the defendant's plea of fraud in the procurement could not avail him unless his evidence showed that the plaintiff was a party to, or was cognizant of, the fact of the fraud; that fraud in the procurement, as contemplated by law, related only to the original maker and payee, or that notice of the fraud was brought home to him.

The motion was overruled, and defendant excepted.

Mabry & Crovatt, for plaintiff in error.

Goodyear & Harris, for defendant.

BECKLEY, Justice.

1. There were two grounds of objection to the introduction of the note in evidence, one of them being that the second indorsement showed the instrument to be the property of the Atlanta Savings Bank, whose cashier had indorsed it over to one C. H. Dexter for collection. On the effect of an indorsement by the payee in blank, followed by an indorsement in full by another person, see 1 Daniel on Neg. Inst., § 696. Where a promissory note is payable to a named person or order, or to the order of a named person, and is indorsed in blank, it is then, until the blank is filled, payable to the holder, and any holder may receive payment, or sue and collect. The payee's order to pay to any holder is not revoked or canceled by the order of some other person to pay to a particular individual.

2. The other ground of objection was that the indorsement of the payees purported to be executed by an attorney, and no power of attorney or other evidence of authority to indorse was produced. The Code, in section 2855, declares that "an indorsement or assignment of any bill, bond or note, when the same is sued on by the indorsee, need not be proved unless denied on oath." A plaintiff who derives his title through an indorsement in blank, is an indorsee, for he has the right to fill the blank and takes the place of indorsee in express words, so long as he holds the instrument. In strictness, the blank ought to be filled when, or before, the instrument is tendered in evidence, but the practice is to treat that as done which can be done, and so a blank indorsement is considered, for most purposes of the suit, as an express indorsement to the plaintiff, if the latter has possession of the paper. We think, too, the Code applies, and that proof of the indorsement is dispensed with, as well where the payees seem to have indorsed by agent or attorney as where they purport to have indorsed in person. And if an agent or attorney can indorse for the payees (than which nothing is more certain), to take the

indorsement for granted without proof, is to take the authority of the agent or attorney for granted without proof; for the indorsement could not, when executed by an agent or attorney, be the act of the payees unless it was duly authorized. We are further of opinion, in the light of the known practice under the Code, and under the statute prior to the Code, that the section which we have quoted dispenses with the proof of the indorsement, whether the action be against the indorser, upon the indorsement itself, or against the maker, upon the note. Indeed, this provision is more applicable in the latter than in the former case; because, in the former, the general rule, found in sections 2851, 3454 and 3472, as to pleas of *non est factum*, would be directly applicable, and would be enough to entitle the plaintiff to go on against the indorser without proof of the indorsement, unless it was denied on oath. In the present case, the plea, so far from denying the indorsement, seems to admit it. We think it does admit it, and then goes forward and makes a point upon the motive and purpose of it.

3. The evidence did not rebut the legal presumption that the plaintiff was entitled to the standing of a *bona fide* holder for value; nor do we see that it made out any defense to the action on the merits. The evidence of fraud in procuring the note originally, amounted to nothing. The plea was wholly unsustained.

Judgment affirmed.

CHANGING A BLANK INTO A SPECIAL INDORSEMENT. § 37.

Martin v. Cole (1881), 104 U. S. 30.

Error to the Supreme Court of the Territory of Colorado.
The facts are stated in the opinion of the court.

Mr. Henry M. Teller, for the plaintiff in error.
No counsel appeared for the defendant in error.

Mr. JUSTICE MATTHEWS delivered the opinion of the court.
The defendant in error was plaintiff below, and brought his action of assumpsit against the plaintiff in error, as indorser of a promissory note, in the District Court of the First Judicial District of Colorado Territory, for the County of Arapahoe, the plaintiff below being the immediate indorsee.

A copy of the note sued on, with the indorsements, filed with the declaration, is as follows:—

"\$1,414.15.

GEORGETOWN, C. T., July 17, 1868.

"On or before eighteen months after date, I promise to pay to John H. Martin, or order, the sum of fourteen hundred and fourteen 15/100 dollars, for value received, at George I. Clark & Co.'s bank at Georgetown, with interest at the rate of three per cent per month from date until paid.

(Signed) "JOHN WEBB."

[Indorsed on back.]

"Pay to the order of Luther A. Cole. Value received.

(Signed) "JOHN H. MARTIN."

The declaration, besides the common money counts, contained five special counts.

The plaintiff in error, in addition to the general issue, filed a special plea to the first and second counts of the declaration, the substance of which is as follows:—

"And the said defendant avers that he made the said indorsement when it was so made, in blank, that is to say, by writing his name across the back of said promissory note, and that he made said indorsement with the express agreement by and between him and the said plaintiff, the said Luther A. Cole, that the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit therein should become necessary. And this defendant avers that, relying upon the assurance of the said plaintiff that his indorsement should not be filled up so as to render him liable as indorsee [indorser] thereon, he signed his name upon the back of said note, which without said assurance he would not have done."

To this plea there was filed a general demurrer, which was sustained.

Afterwards, on June 6, 1874, the cause was submitted, by consent of parties, without the intervention of a jury, when the court found the issues in favor of the plaintiff, and rendered judgment against the defendant for \$2,478.17 damages and costs.

A bill of exceptions was taken, which sets out all the evidence given and offered in the trial of the case. From that it appears that the defendant below, Martin, being on the stand as a witness in his own behalf, was asked to state under what circumstances the note in suit was transferred by him to the plaintiff, Cole. Objection being interposed, the defendant then stated to the court that he offered to prove in defence a parol promise contemporaneous with the indorsement of the note; that he proposed to prove

by the witness that the parol agreement set forth and stated in the defendant's second plea was made by the parties. The court sustained the objection, and the defendant excepted.

Thereupon the defendant offered to prove that at the time the note was transferred by Martin to Cole it was expressly agreed between them that Martin should indorse his name on the note in blank to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note; to which offer an objection, interposed by the plaintiff, was sustained, and the defendant excepted.

The defendant had previously testified that his name on the back of the note was written by him, but that the words "Pay to the order of Luther A. Cole, value rec'd," were not written at the time of the indorsement and delivery of the note, nor by him at any time.

The plaintiff below read in evidence the depositions of William L. Campbell, Levi H. Shepperd, and John T. Harris, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity. Objections were made to their depositions, and overruled; to which an exception was taken. The objections, however, do not appear to be of sufficient importance to require further notice.

The plaintiff also read in evidence the transcript of the record, judgment, and proceedings in the action of Luther A. Cole against John Webb, the maker of the note, together with the execution, levy, and return, being the same referred to in the first count of the declaration. From that it appears that the execution was issued on May 9, 1870, returnable in ninety days from date, and actually returned on June 7, 1870, showing the levy and sale referred to in the pleadings.

There was other testimony, also, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity, and at the time of the bringing of this action.

An appeal was taken from the judgment of the District Court of the First Judicial District of the County of Arapahoe to the Supreme Court of Colorado Territory, in which, at the February Term, 1875, errors were assigned, and the judgment was affirmed in that court on March 28, 1876.

To reverse that judgment is the object of the present writ of error.

The agreement set out and relied on in the plea was that "the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary." And the defendant averred that "he, relying upon the assurance of the said plaintiff that his indorsement would not be filled up so as to render him liable as indorser thereon, signed his name upon the back of said note, which without said assurance he would not have done." As the indorsement in blank, admitted by the defendant to have been made by him, without being filled up by the plaintiff at all, rendered him liable for the payment of the note as an indorser, the breach by the plaintiff of the alleged agreement was inconsequential, and could not, in law, result in any actionable injury; for filling up the blank indorsement in the manner in which it was done neither added to nor subtracted from the liability which the defendant assumed by merely writing his name on the back of the note.

The defendant below, however, further offered at the trial to prove that at the time the note was transferred by Martin to Cole it was expressly agreed between them that Martin should indorse his name on the note in blank, to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note. No question was made at the time, nor has been raised since, as to the admissibility of such proof under a plea of the general issue; and waiving any objection on that account, the rejection by the court below of this offer fairly raises the issue intended to have been made by the special plea, whether it is competent, in an action against an indorser by his immediate indorsee, upon an indorsement made in blank of a negotiable promissory note, to prove, as a defence, that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse.

It has never been contended that such a defence, based on dealings between prior parties, could be maintained to defeat the title of a *bona fide* holder for value of negotiable paper, acquired before maturity, in the usual course of business, and without notice; for the protection of such a title is of the essence of the policy of the law merchant, and inheres in the very definition of

negotiability. Hence, in that case, a collateral but contemporaneous written agreement between two prior parties to a bill or note would not affect its validity in the hands of the holder, more than if the agreement were unwritten. Whereas, between the immediate parties, if the agreement relied on were in writing, its terms would fix and determine their rights and obligations, as was decided by this court in *Davis v. Brown*, 94 U. S. 427. The question is between them alone; and is, whether the same effect will be given to such an agreement, not reduced to writing.

The ground of decision must be found in some other principle or policy of the law than that which protects the title of a remote innocent holder of negotiable paper.

Accordingly, Mr. Justice Washington, in *Susquehanna Bridge & Bank Co. v. Evans*, 4 Wash. 480, after admitting proof of such an agreement, in an action by the holder of a promissory note against his immediate indorser, said, in his charge to the jury:

"The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was, therefore, properly admitted."

It is upon this distinction between contracts express and implied that those judicial tribunals have proceeded, in which such proof is held to be admissible. It is declared, for example, by the Supreme Court of Pennsylvania, in *Ross v. Epsy*, 66 Pa. St. 481, 483, that "the contract of indorsement is one *implied* by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an *express* agreement."

So in an early case in New Jersey, *Johnson v. Martinus*, 9 N. J. L. 144, it was held by the Supreme Court of that state that parol evidence was competent to overcome the implied contract which results from a blank indorsement, on the ground that such indorsement is an inchoate or imperfect contract and not a written instrument, nor entitled to its effect, protection, or immunity.

This case, however, was expressly overruled by the same court in *Chaddock v. Vanness*, 35 id. 517, in which it is plainly

indicated that the distinction attempted to be made, in some of the cases, between indorsements in full and those which are in blank, is untenable.

The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not in any proper sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full.

It is spoken of by Wharton, *Law of Evidence*, &c., Sec. 1059, as a contract *at short-hand*. The same view is taken in Daniels on Negotiable Instruments, Sec. 718, where the author states, as a resulting conclusion that embodies the true principle applicable to the subject, that, "in an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer, against him." If the commercial contract of indorsement is treated as a contract in writing, this conclusion is undoubtedly correct. If it is not, we have the anomaly of applying one rule between maker and payee, and a different one between payee becoming indorser and his immediate indorsee, without any difference to justify it, in the relation of the parties to each other in the two cases.

The rule is tersely stated in Benjamin's *Chalmer's Digest of the Law of Bills of Exchange*, &c., Art. 56, p. 63.

"The contracts on a bill, as interpreted by the law merchant, are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect." Citing *Abrey v. Crux*, 5 Law Rep. C. P. 37.

The rule as declared by Mr. Justice Washington in the case cited was expressly rejected by this court in *Bank of the United States v. Dunn*, 6 Pet. 51, one distinct ground of its opinion being that parol evidence is not admissible to vary a written agreement; citing the language of the court in *Renner v. Bank of Columbia*,

9 Wheat. 581, 587: "For there is no rule of law better settled or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary *the legal import* of a written agreement."

The authority of this case on this point has never been questioned in this court, the explanation and qualification in *Davis v. Brown, supra*, having reference only to the rule as to the competency of an indorser as a witness to impeach the validity of a negotiable instrument to which he is a party. In the case last referred to, the agreement relied on to qualify the instrument was admitted because it was in writing and part of the transaction.

The case of *Bank of the United States v. Dunn, supra*, is cited as an authority upon the point in *Phillips v. Preston*, 5 How. 278, 291, "because, in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports."

It is also referred to in terms and followed in *Brown v. Wiley*, 20 id. 442. In delivering the opinion of the court in that case Mr. Justice Grier used this language:

"When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill the owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract, that it should not be presentable till a distant, uncertain, or undefined period, tended to alter and vary, in a very material degree, its operation and effect. (See *Thompson v. Ketchum*, 8 Johns. 192)."

The action in this case, it is true, was between the payee and drawer, upon a bill of exchange; but the obligation on which it was founded, that the drawer would pay in the event of non-acceptance by the drawee, notice of dishonor and protest, is one not actually expressed in terms in the bill itself, but imported by construction of law, as constituting the operation and effect of the contract.

In *Specht v. Howard*, 16 Wall. 564, Mr. Justice Swayne, delivering the opinion of the court, quotes from Parsons on Notes

and Bills, 501, that "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to or subtract from, the absolute terms of the written contract."

The same quotation forms part of the opinion in *Forsythe v. Kimball*, 91 U. S. 291, with the addition that, in the absence of fraud, accident, or mistake, the rule is the same in equity as at law.

The same principle, upon the authority of these cases, was affirmed by this court in *Brown v. Spofford*, 95 id. 474, and is assumed to be the law in *Cox v. National Bank*, 100 id. 704, and *Brent's Ex'rs v. Bank of the Metropolis*, 1 Pet. 89.

In view of this line of decisions, the question, as it arises in this case, cannot now be considered an open one in this court.

It coincides with the rule adopted and applied in most of the states, but the cases are too numerous for citation. They will be found collected, however, in Bigelow, Bills and Notes, 168; Byles, Bills (6th Am. ed.), Sharswood's note, 157; 1 Daniel, Negotiable Instruments, Secs. 80, 717 *et seq.*; 2 Wharton, Evidence, Sec. 1058 *et seq.*; Benjamin's Chalmers's Digest of the Law of Bills of Exchange, Art. 56, p. 63.

Of course there are many distinctions which, upon the circumstances of cases, determine the applicability of the rule, and classes of cases which form apparent exceptions to it. It is not necessary to refer to them here, further than to say that the limitations of the rule are perfectly consistent with it, and its application in this, as in other proper cases, will not be considered as encroaching upon them.

We find no error in the record.

Judgment affirmed.

THE QUALIFIED INDORSEMENT.

§ 40.

Corbett v. Fetzer (1896), 47 Neb. 269.

Error from the District Court of Douglas county. Tried below before Irvine, J.

B. ~~Q~~ *Burbank*, for plaintiffs in error.

J. J. O'Connor, contra.

Post, C. J. This was a proceeding by Fetzer, the defendant in error, in the District Court for Douglas county to foreclose fifty-seven different mortgages executed by William B. Cowles

and wife to Editha H. Corbett, upon certain property in North Side Addition to the city of Omaha, to secure payment of as many notes of even date therewith, payable by said Cowles to the order of the mortgagee named. It is alleged in the petition that the said Editha H. Corbett, Charles Corbett, Day & Cowles, and R. W. Day, who were made defendants, indorsed said notes and thus became liable thereon. The prayer is for a foreclosure of the mortgages and for personal judgment against Day & Cowles, R. W. Day, and the Corbetts for any balance remaining due on their said indebtedness, after applying thereon the proceeds of the mortgaged property. Of the defendants named the Corbetts (husband and wife) only answered, admitting the allegations of the petition, except as to their personal liability, and charging that the notes above described were indorsed without recourse upon them. The reply is a general denial. The district court, upon the issues joined, found generally for the plaintiff, accompanied by a special finding that the Corbetts were liable as indorsers of said notes, and a decree was entered in accordance therewith, which has been removed into this court for review.

Practically the only question presented by the motion for a new trial and the petition in error relates to the liability of the Corbetts as indorsers of the notes above described. On the back and near the top of each of said notes appears the following: "E. H. Corbett. Chas. Corbett. Without recourse on us. Day & Cowles. R. W. Day." Said notes, according to the claim of the Corbetts, had been pledged to Samuel R. Johnson, bearing their indorsement in blank, as collateral security, and shortly before the consummation of the sale thereof to Fetzer the words immediately following their names, as shown above, were added in order to limit their liability thereon. The transaction which resulted in the purchase of the notes by Fetzer was conducted on the part of the Corbetts by R. W. Day, one of the defendants named, who testified that the indorsements "Day & Cowles" and "R. W. Day" were made during such negotiations at the request of the plaintiff, and that previous to such indorsement the words "without recourse on us" were written thereon in his presence by C. W. Johnson, a clerk in the office of Mr. Corbett, and in which he is corroborated by both Johnson and Corbett. There are observable from the records facts which tend strongly to sustain the contention that the words of limitation were intended to apply to the indorsement of the Corbetts rather than to that of Day & Cowles or R. W. Day. They were in the first place written with different ink, apparently at a different time, and certainly in

a different hand from that employed in the subsequent indorsements. They were also written by Corbett's clerk, by his order and direction, pending the negotiations for the sale of the notes and at a time when the question of their liability upon paper of like character would naturally be uppermost in the minds of solvent indorsers, as the Corbetts are shown to have been. Johnson was asked on cross-examination why the words "without recourse" were not written over the names of the indorsers, to which he answered, in substance, that Mrs. Corbett's name was written so near the upper margin of the note as to leave no room therefor,—an explanation which is shown by the record to be entirely consistent with the facts. Again, the claim that the subsequent parties, instead of the Corbetts, indorsed without qualification finds support in the fact that both R. W. Day and the firm of Day & Cowles were beneficially interested in the sale of the notes, and the further fact that their absolute liability thereon is established by the personal judgment entered against them in this case by default, as also by the admission under oath of Day, who testified in behalf of the defendants. On the part of the plaintiff below, Fetzer, it is shown that when the notes were first exhibited to him by Day, four or five days previous to the close of the transaction, they bore no indorsements aside from the names of the Corbetts, and that when next seen by him they were indorsed as now, except the name of Mr. Day, which was added in his, Fetzer's, presence at the time they were delivered to him. He testified also that he purchased the notes described, relying upon the indorsements of the Corbetts, paying therefor seventy-eight per cent of their face value, and that at the same time he purchased other notes executed by Cowles and indorsed by the Corbetts without recourse, at fifty-four per cent of the amount due thereon. He is also corroborated to some extent by his brother, William Fetzer, and Mr. Martin, who were present during the several interviews with Day. A final analysis of the evidence shows the following facts, as to which there is no substantial controversy: (1.) When the notes were first offered for sale to Fetzer they bore the blank indorsement of the Corbetts. (2.) Afterward, pending negotiations for the sale thereof, Charles Corbett, for the purpose of limiting the liability of himself and wife as indorsers of said notes, caused to be written thereon immediately below their names the words "without recourse on us." (3.) The names of the said Editha H. Corbett and Chas. Corbett were written so near the margin of said notes and each of them as to leave no room for the words quoted above their names.

(4.) R. W. Day, one of the subsequent indorsers, has expressly admitted his liability on said notes, and the absolute liability of the firm of Day & Cowles thereon is established by the decree in this case entered by default. (5.) That said notes, when finally purchased by Fetzer, bore all the indorsements now appearing thereon, except the name of R. W. Day, and were at said time indorsed by said Day at his, Fetzer's, request. (6.) Fetzer purchased said notes, paying therefor seventy-eight per cent of their face value, relying upon the indorsement of the Corbetts, who were then solvent.

The remaining questions merely involve the application of the law to the facts above stated. A case in point is *President of Fitchburg Bank v. Greenwood*, 84 Mass. 434. Upon the back of the note produced at the trial of that case there appeared in three successive lines the following indorsements: "Greenwood & Nichols—without recourse—Asa Perley, 2d." Parol evidence was offered by Greenwood & Nichols tending to prove that the words "without recourse" were written by them for the purpose of limiting their liability as indorsers and rejected in the absence of an offer to prove notice by the plaintiff, a remote indorsee and alleged *bona fide* holder. In reversing the judgment of the lower court Bigelow, C. J., said: "There is no rule of law which requires a party to limit or qualify his indorsement by any writing preceding his signature. Such qualification may and often does follow the name of the party. Text-writers of approved authority recognize this mode of limiting the liability of an indorser as regular and appropriate." The doctrine of that case is sustained by the following authorities therein cited: Chitty, Bills (10th Am. ed.), 234, 235; Story, Promissory Notes, Sec. 138 and note; and in 2 Randolph, Commercial Paper, Sec. 720, we observe it is approved in the following emphatic language: "The words 'without recourse,' following the name of an indorser, A, and preceding the name of indorser B, may be shown by A to apply to his indorsement, even against a *bona fide* holder who supposed it to apply to B's." It may be, as intimated, that there existed a purpose, shared by Day and Corbett, to deceive the plaintiff by inducing him to purchase the notes in the belief that the Corbetts were liable thereon. Such a contention has, however, no foundation either in the pleadings or the proofs, which show that he, Fetzer, throughout the entire transaction, relied upon his own judgment respecting the value of the paper in question; nor is there any force in the objection that the evidence explanatory of the indorsement of the notes by the Corbetts tends to change or

vary their written obligation. As bearing upon that question, we quote further from the opinion above cited: "It [the evidence offered] had no tendency to vary or control the written contract, or to change the legal effect of the indorsement. It only proved what the contract really was, at the time it was entered into by the defendants. * * * The attempt in this case is not merely to hold the defendants on a contract according to its meaning and legal effect, but to fasten on them a contract into which they never entered. If the plaintiffs mistook the application of the words which were written for the purpose of qualifying the indorsement of the defendants on the note, this fact furnishes no ground for enlarging or changing their liability on the contract into which they in fact entered." It will be remembered, too, that this cause presents no question of fraud or estoppel, nor is the action one between the indorser and a *bona fide* holder of commercial paper, but between the parties to the contract of indorsement, and, therefore, within the rule recognized in *Holmes v. First Nat. Bank of Lincoln*, 38 Neb. 326. It was held in the case last cited that, as against a subsequent *bona fide* holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence; but that, as between the original parties thereto, the precise terms of such contract is always a subject of inquiry, and that parol evidence is admissible for that purpose. The conclusion we reach is that the provision of the decree of the district court for a deficiency judgment against Corbett and wife is unsupported by the evidence, for which it should be reversed and the cause dismissed as to the plaintiffs in error.

Reversed.

IRVINE, C., not sitting.

THE CONDITIONAL INDORSEMENT.

§ 41.

Robertson v. Kensington (1811), 4 Taunt. 30.

This was an action of *assumpsit*, and the first count in the declaration was on a bill of exchange, of which the following is a copy, viz.:

"*Edinburgh*, 18th Nov. 1808. £180. sterling. At 45 days after date, pay this first of exchange, to the order of Mr. *Robert Robertson*, £180. sterling, value received, which place to account, as advised, *W. Forbes, J. Hunter and Co.*" "To Messrs. *Kensington, Styant, and Adams*, bankers, *London.*" "Accepted, *Ken-*

sington and Co. Entered, *P. J. Raeburn*. Indorsed, *Edinburgh*, 19 Nov. 1808. Pay the within sum to Messrs. *Clerk and Ross*, or order, upon my name appearing in the *Gazette*, as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date. *R. Robertson*. Clerk and Ross. *J. Tindale*. *Thomas Eyre and Sons*. *Thomas Nelson*. *Dudding and Nelson*. Bank of England."

The Plaintiff declared as payee, against the Defendants as acceptors. The declaration also contained counts for money had and received by the Defendants to the use of the Plaintiff, for money paid by the Plaintiff to the use of the Defendants, on an account stated, and for interest.

The plea was, the general issue. At the trial of this cause before *Mansfield C. J.*, and a special jury, at the sittings after *Hilary* term 1811, at *Guildhall*, a verdict was entered by consent for the Plaintiff for the sum of 180*l.*, subject to the opinion of the Court on the following case. The bill, which was for 180*l.*, was drawn at *Edinburgh* on the 18th November 1808, by Sir *Wm. Forbes, J. Hunter and Co.*, upon the Defendants, who are bankers in *London*, payable to the order of the Plaintiff, at 45 days date, for value received. The indorsements by the Plaintiff, and by *Clerk and Ross*, as above set forth, were made before the bill was presented to the Defendants for acceptance. The bill was delivered to *Clerk and Ross*, army agents in *Edinburgh*, being persons then employed by the Plaintiff to procure for him by purchase the commission of ensign above referred to. The bill, with those indorsements upon it, was afterwards presented to the Defendants for acceptance, and accepted by them in the usual course of their business as bankers. It was afterwards indorsed and negotiated by the other persons whose names appear as indorsers, and finally with the *Bank of England*, who discounted it. At the expiration of the 45 days specified in the bill as originally drawn, and the days of grace, the Defendants paid the contents to the *Bank of England*, who presented it to them for payment. The Plaintiff, at the time of drawing the bill, paid the full value of the same to Sir *Wm. Forbes, J. Hunter and Co.*, the drawers, but did not ask, or obtain, their consent, or that of the Defendants, the acceptors, to make any alteration in the tenor of the bill by indorsement, either as to the condition of the payment, or the extension of time. The Plaintiff's name had never appeared in the *Gazette* as ensign in any regiment of the line. The question for the opinion of the Court was, whether the Plaintiff was entitled to recover: if *no* was, the verdict was to stand; if *he*

was not entitled to recover, a verdict was to be entered for the Defendants.

This case was argued by *Lens* Serjt. for the Plaintiff, who contended, that it was competent for the Plaintiff by this special indorsement to make only a conditional transfer of the absolute interest in the bill, which he had purchased for a full consideration, and had vested in him by the delivery of the drawer. The Defendants, by subsequently accepting the bill, had become parties to that conditional transfer, and as the condition had never been performed, the transfer was defeated, and they became liable, after the expiration of the two months, to pay the Plaintiff, to whom the property then reverted, the contents of the bill, of which none of the indorsers could enforce payment against the Defendants at the 45 days end, because they had all received the bill subject to the condition, and were bound thereby. He cited *Ancher v. Bank of England*, *Doug.* 638.

Shepherd Serjt. for the Defendant, contended that it was immaterial whether the acceptance was before or after the conditional indorsement. The acceptance admitted the hand-writing of the drawer, but it did not mix itself with the conduct of the indorsers: it admitted nothing which was on the back of the bill. The whole practice of the courts was accordingly; for in an action against the acceptor, it became unnecessary to prove the hand-writing of the drawer, but it was necessary to prove the hand-writing of the indorser.

The Court gave judgment for the Plaintiff.

THE RESTRICTIVE INDORSEMENT.

§ 38.

Edie & Laird v. East India Company (1761), 1 *Wm. Blackstone*, 295.

Action on two Bills of Exchange of 2000*l.* each, drawn by *R. Clive* on the *East-India Company*, at three hundred and sixty-five Days after Date, payable to *R. Campbell or Order*. *Campbell* indorsed one to *Ogleby*, or Order, the other to *Ogleby*, without adding the Words *or Order*. But at the Trial, the Words *or Order* appeared upon the Endorsement in another Hand-Writing. The *East-India Company* accepted both Bills. *Ogleby* then endorsed them to the Plaintiffs, and soon after became Insolvent. The Company then refused Payment. The Jury found a Verdict for the Plaintiffs on the first Bill, but for the Defendants on the

second; apprehending, that by the Usage of Merchants it was not assignable, without the Words *or Order* in *Campbell* the Payee's Indorsement.

Lord *Mansfield* Chief Justice. There can be no Dispute, where the Indorsement is in Blank. There, you may write over it, whatever you please. And it has been permitted to be done even in Court. But for this there is no Occasion. Every thing shall be intended upon such a blank Indorsement. The Point relied on at the Trial for Defendants was, that where a special Indorsement was made to *A. B.* and the Indorser omitted the Words, *or Order*, this was equivalent to the most restrictive Indorsement. Many Witnesses were examined by Defendants to prove this Usage; but it did not appear that in any one Fact, the Indorsee of such special Indorsement, ever lost the Money, by such Omission. The Evidence was only Matter of Opinion.

I told the Jury that upon the general Law (laying Usage out of the Case) the Indorsement carried the Property to *Ogleby*; and that the Negotiability was a Consequence of the Transfer.

But if they found an established Usage among Merchants, that where the Words *or Order* were omitted, the Bill was only negotiable on the Credit of the Indorsee, they should find for the Defendants. If otherwise, or they were doubtful, then either for the Plaintiffs, or make a Case of it. They found for the Defendant on the Bill in question; for the Plaintiff on the other, concerning which there was no Dispute.

Now upon the best Consideration I have been able to give this Matter, I am very clear of Opinion, that at the Trial, I ought not to have admitted the Evidence of Usage. But the Point of Law is here settled; and, when once solemnly settled, no particular Usage shall be admitted to weigh against it: This would send every thing to Sea again. It is settled by two Judgments in *Westminster-Hall*, both of them agreeable to Law and to Convenience. The two Cases I go upon are, *Moore* and *Manning* in *Comyns*, and *Acheson* and *Fountain* in *Strange*. These Cases go upon a general Proposition in Law, that an Indorsement to *A.* implies *or Order*, and is negotiable.

The main Foundation is, to consider what the Bill was in its Origin. The present Bill, in its original Creation, was not a bare Authority, but a negotiable Draught. There are no restrictive Words in it. And whatever carries the Property, carries the Power to assign it.

It were absurd, if the Merchants Opinion should prevail, that this is now converted into a personal Authority. If it be such,

that the Indorsee dies, it could not go to his Executors and Administrators; in whom most clearly the Property of the Bill does vest.

Upon this Ground, that the Point is settled both by *King's Bench* and *Common Pleas*, and well settled, I think there should be a new Trial. Otherwise also, I should be of the same Opinion. Certainly, the Suggestion of Surprise, is not in all Cases a Reason for a new Trial; but in particular Cases, such as the present, it may be.—The Question of Costs is very peculiar. There is a Verdict in part for the Plaintiff, which already carries Costs for him. But, for Form's Sake, we must set aside the whole Verdict, which is usually done on Payment of Costs. But this will be giving Defendants Costs, which they could not otherwise have, merely because they have obtained an improper Verdict. Therefore I think, that under these particular Circumstances, the Verdict should be set aside without Costs.

Denison Justice. I am of the same Opinion. If the Words to *A. B. only* were inserted, I should think it would not be restrictive: At least it should be left to a Jury. In *Rawlinson and Stone*, *M. 20 Geo. 2.* An Inland Bill of Exchange was drawn payable to *A.* or Order, who indorsed it to *B.* without adding any thing more. The Question was, Whether there was such an Interest in the Executor of the Assignee, as that he might assign it. The Court held, upon Enquiry from Merchants, that it might be indorsed thus: "*C. Executor or Administrator of B.*" When a Man says, "Pay to *A.*" the Law says, it is "to *A. or Order.*" He then says, I intend it should not be so. What signifies what you intend? The Law intends otherwise? Same Opinion as to Costs.

Foster Justice. I am of the same Opinion. This is now the settled Law, and ought not to have been left to a Jury, People talk of the Custom of Merchants. This Word *Custom* is apt to mislead our Ideas. The Custom of Merchants, so far as the Law regards it, is the Custom of *England*; and therefore Lord *Coke* calls it, very properly, the Law-Merchant. We should not confound general Customs with special local Customs. I think there should be no Costs.

Wilnot Justice. There are two Questions. Whether the Law is fully settled, and upon what Principles? It is certainly now settled, and upon these Principles. The Original Contract between the Drawer and Payee, is to pay to the Payee and his Assigns, and the Assigns of such Assigns, *in infinitum*. There is the same Privity, between the Drawer and the last Assignee, as the first. The first assigns over that *Chose in Action*, which, in

its Nature and by the express Permission of Law, is assignable, with the same Privileges and Advantages, that it had when he received it. It might be a considerable Question, whether a man can limit and modify the Property or not, even by express Words of Restriction, so as to check its Currency. By giving a bare Authority, he may do it; as "Pay to *A.* for my Use;"—But if he indorses it generally, I should have a great Doubt; supposing it purchased by a subsequent Indorsee, for a valuable Consideration. In the present Case, I think assigning it to *A.* carries the Property, with all its Qualities. It implies a Consideration to have been given. I have a Note of *Acheson* and *Fountain*. Mr. *Wearg* then cited a Case so determined in *Common Pleas*, probably that of *Moore* and *Manning*. Another Case shews the liberality, with which Indorsements have been construed. *Carth.* 403.

The Question was, Whether Indorsement to the Order of *A.* will enable *A.* to maintain an Action. Determined, that it will. If so, *a fortiori*, an Indorsement to *A.* will enable him to indorse it. Custom of Merchants is the general universal Law. Facts must be reiterated to make such a Custom. The Opinion of Merchants is nothing. Special Custom of Merchants has been controlled in a Case, where an Indorser had divided a Note and indorsed it to several Persons. *Carth.* 466 *Salk*.

Held, that the Indorser cannot vary the original Contract, and split one Note into Twenty. Determined to be a void Custom, though allowed to be the Custom of Merchants. Same Opinion as to Costs.

New Trial was granted without Payment of Costs.

INDORSEMENT CONSTITUTING THE INDORSEE THE AGENT OF THE
INDORSER. § 38—2.

Locke v. Leonard Silk Company (1877), 37 Mich. 479.

Error to Wayne.

Assumpsit. The facts are stated in the opinion.

Moore & Moore, for plaintiff in error.

E. Y. Swift and *Hoyt Post*, for defendant in error.

MARSTON, J. Defendant in error commenced an action of assumpsit in justice's court to recover the amount due on a promissory note given by Locke to the company. * * * On the

trial, the plaintiff recovered judgment. The cause was then removed by *certiorari* to the circuit court, where the judgment of the justice was affirmed. The case comes here on writ of error.

The note offered in evidence was endorsed "Pay H. A. Redfield, cashier, or order, for collection," and it is claimed that by this endorsement the plaintiff parted with all title and interest in the note and was not therefore entitled to recover. This position is not well taken; the endorsement is for a special purpose, that of collection only. If paid, the proceeds would have belonged to the plaintiff; the title to the note, and the proceeds thereof, when collected, remained in the plaintiff. *Sutherland v. First National Bank*, 31 Mich. 232.

Judgment reversed, but only on matters of practice.

Judgment reversed.

The other Justices concurred.

Smith v. Bayer et al. (1905) (Ore.), 79 Pac. Rep. 497.

Appeal from Circuit Court, Multnomah county.

M. C. George, Judge.

Action by Milton W. Smith against J. C. Bayer and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

This is an action on a promissory note for \$290, executed and delivered by the defendants to the Concordia Loan & Trust Company of Kansas City, Mo., on January 30, 1896, due on or before August 1st following. The complaint alleges the execution of the note, its indorsement to the plaintiff before maturity, the making of certain payments thereon by defendants, and prays judgment against them for the balance. The answer admits the genuineness of the note, denies that it was indorsed to the plaintiff before maturity or at all, and affirmatively alleges that it remained the property of the payee named therein until after maturity, when it was transferred to the Fidelity Trust Company, and that thereafter the defendants paid the note to the trust company and satisfied it in full. The reply denies the allegations of the answer, and affirmatively pleads that at all the times mentioned the plaintiff was and now is the owner in his own right of two-sevenths of the note, and since the 21st day of July, 1896, has been and now is the owner of the remaining five-sevenths for collection. Upon the trial plaintiff produced the note, with

an indorsement thereon as follows: "Pay to the order of Milton W. Smith for collection and return to Concordia Loan & Trust Company, A. D. Rider, treasurer, OK, F. Amelung." He testified that he received the note in due course of mail from the loan and trust company, inclosed in a letter which the witness produced, and which stated, in substance, that the note was remitted for collection; that he knew the signature to the letter, had seen the handwriting, and knew that it was the signature of the Concordia Loan & Trust Company, and the person signing it had authority to represent the company; that such person was and had been employed by the company for a good many years, doing business for it and exercising such authority; that witness knew that he had the right to make contracts in the name of and for the company; that he (witness) knew the indorsement on the note to be that of the payee; that Rider, who made it, was the treasurer of the company, and had done business for it as such for a good many years; that witness knew him personally, had seen him write, and knew that his signature to the indorsement was genuine; that the other name to the indorsement was simply an "O. K." or ratification by some one; that Rider is the treasurer of the company, and has always done its business. The note was then admitted in evidence over defendants' objection on the ground that the indorsement did not transfer such title to the plaintiff as would support an action thereon in his own name, and because the genuineness of the indorsement had not been sufficiently proved. The witness was also permitted to testify, over defendants' objection and exception, that he was in fact the owner in his own right of two-sevenths of the note, and the court instructed the jury that any settlement made by the defendants with the payee or owner of the note after the indorsement thereof to the plaintiff would not be a defense against the plaintiff's two-sevenths interest therein, although it would be such defense against the other five-sevenths. The verdict and judgment were in favor of the plaintiff, and the defendants appeal.

Ralph R. Duniway, for appellants.

Milton W. Smith, in pro. per.

BEAN, J. (after stating the facts). The record bristles with assignments of error. Indeed, it would seem that almost every step in the progress of the trial was objected to by the defendants, and exceptions saved to the rulings of the court. The questions thus raised are embodied in the record and discussed more or less in the brief. They are, however, mostly technical

and without merit. There was, in our opinion, sufficient proof of the genuineness of the indorsement on the promissory note offered in evidence to make a *prima facie* case in favor of the plaintiff. The plaintiff, testifying in his own behalf, said that he was familiar with the signature of the loan and trust company, knew that the man who signed the indorsement was an officer of the company and had been doing business for it for many years, and that his signature to the indorsement was genuine. The weight to be given to this testimony was, of course, for the jury. The only points of real importance on this appeal are: (1) Whether the indorsement, being on its face "for collection and return" to the payee, vested plaintiff with such a title as will enable him to maintain an action thereon in his own name; and, if so, (2) whether the court erred in admitting parol testimony tending to show that plaintiff was in fact the owner of two-sevenths of the note, and in instructing the jury that, if such was the case, any settlement with the payee or assignee subsequent to the date of the indorsement to plaintiff would be no defense as against plaintiff's two-sevenths. The indorsement of a promissory note by the payee with the words "for collection," or the like, is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right. *White v. National Bank*, 102 U. S. 658, 26 L. Ed. 250; *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Sweeney v. Easter*, 1 Wall. 166, 17 L. Ed. 681; *Williams, Deacon & Co. v. Jones*, 77 Ala. 294; *People's Bank of Lewisburg v. Jefferson County Savings Bank*, 106 Ala. 524, 17 South. 728, 54 Am. St. Rep. 59; *Central Railroad v. First National Bank of Lynchburg, Virginia*, 73 Ga. 383. There is, in the absence of a statute, some conflict in the decisions as to whether such an indorsee can sue in his own name. The weight of authority seems to be in favor of his right to do so. 4 Am. & Eng. Ency. Law (2d Ed.) 274; *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160; *Roberts v. Parrish*, 17 Or. 583, 22 Pac. 136; *Falconio v. Larsen*, 31 Or. 137, 48 Pac. 703; Selover, Bank Collections, § 28. And it is now so provided by statute in this state. B. & C. Comp. § 4439; Selover, Negotiable Instruments Law, § 155; Crawford, Neg. Inst. Law, § 67. We are therefore of the opinion that the present action was rightfully brought in the name of the plaintiff. It was open, however, as

against him, to all defenses which could have been made if the notes had remained in the hands of the indorser, and the action had been brought by it. *Wilson v. Tolson*, 79 Ga. 137, 3 S. E. 900; *Leary v. Blanchard*, 48 Me. 269. The indorsement did not pass the title, nor did it deprive the defendants of any defense they may otherwise have against the note. It merely created the plaintiff the agent of the payee for collection with the right to sue in his own name. The plain meaning of such an indorsement, as said by Mr. Justice Miller (*White v. National Bank*, 102 U. S. 658, 26 L. Ed. 250), is that the maker of the note "is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser." Such being the effect of the restrictive indorsement and the character of the title acquired by the plaintiff by reason thereof, it necessarily follows that the court was in error in admitting evidence to contradict the contract of indorsement by showing that the note was not transferred to the plaintiff for collection as shown on its face, but that he actually owned two-sevenths thereof in his own right, and in instructing the jury that a settlement made with the payee after the indorsement to plaintiff would be no defense against plaintiff's two-sevenths. The contract of indorsement is in writing. The terms thereof are plain and unambiguous, and parol evidence is not admissible to vary or contradict it. *White v. National Bank*, 102 U. S. 658, 26 L. Ed. 250; *Leary v. Blanchard*, 48 Me. 269; *Howe v. Taylor*, 9 Or. 288. The plaintiff's action is based on the indorsement, and not on any interest he may have in the note. He is made by the indorsement the mere agent of the payee for its collection. The defendants' obligation, notwithstanding the indorsement, is to the payee or subsequent owner of the note, and not to the plaintiff. If they settled and paid the note to the payee or assignee, such settlement is a complete defense to an action thereon by plaintiff as a mere agent for collection. It may be suggested that, because the jury found a verdict in favor of plaintiff for the entire amount sued for, they must have found that the settlement alleged as a defense was never made, and therefore the error of the court in charging the jury in relation thereto was harmless. The ruling of the court upon this point and its instructions to the jury injected into the case an issue not proper to be tried, the result of which

was to confuse and mislead the jury, and we do not think it can be said that the error was harmless.

From these views it follows that the judgment of the court below must be reversed, and a new trial ordered. Many of the other questions argued in the briefs will probably not arise on a retrial, and need not, therefore, be noticed at this time.

INDORSEMENT VESTING TITLE IN INDORSEE IN TRUST. § 38—3.

Blaine et al. v. Bourne et al. (1875), 11 R. I. 119.

Browne & Van Slyck, for plaintiffs.

James M. Ripley, for defendants.

Assumpsit on a bill of exchange, heard by the court.

March 6, 1875. POTTER, J. The draft in question was as follows:

"BANKING HOUSE OF BLAINE, GOULD & SHORT,

"NORTH EAST, PA., August 16, 1873.

"Thirty days after date pay to the order of Frank Thayer
seven hundred dollars.

"FRANK THAYER.

"To Messrs. B. G. CHACE & Co., Providence, R. I.

"Due September 18."

Thayer was the agent in Pennsylvania to make purchases for Chace & Co., of Providence, and he drew on them for payment.

This draft was indorsed by Thayer in blank, and was discounted by the plaintiffs before acceptance. The plaintiffs indorsed it as follows:

"Pay Jay Cooke & Co. or order on account of Blaine, Gould & Short, North East, Pa. "ALFRED A. SHORT, Cash'r."

By Jay Cooke & Co. it was sent to the defendants in Providence for collection, indorsed as follows:

"Pay to the order of Messrs. Bourne & Co.

"JAY COOKE & Co."

The draft was paid by Chace & Co. to the defendants about noon of September 18. Jay Cooke & Co. stopped payment about eleven A. M. of that day, and about one P. M. of the same day their failure was generally known in Providence.

The draft was never the property of Jay Cooke & Co., and

was never credited by them to the plaintiff, but was merely received by them for collection.

Jay Cooke & Co. were owing the defendants, and the defendants credited it in their account with them, and claim that they had a right so to do.

The rights of parties to bills forwarded for collection have been a fruitful source of litigation. Questions of this sort have generally arisen where some party becomes insolvent, and the contention is who shall bear the loss.

When is the last holder of paper sent for collection bound to look beyond the last remitter?

We are referred by defendants' counsel to one case only, *Bank of Metropolis v. New England Bank*, 17 Pet. 174; also in 1 How. U. S. 234. In that case a bank had forwarded for collection paper with a general or unrestricted indorsement to another bank, which, with its own similar indorsement, had sent it to a third bank for collection. The second or intermediate bank failed, and on the day of its failure notified the third bank that the paper was the property of the first bank. In a suit by the first against the third bank to recover the proceeds, the court, while admitting that if it was a case of two banks acting as collecting agents for each other, and where no consideration was paid or money advanced, the paper would remain the property of the sender, holds that in this case the third bank, which held the paper; not having notice by the indorsement or otherwise that the paper was not the property of the second bank, had a right to treat it as theirs, and was not bound to inquire; and that where two banks dealt together in this way for several years, kept an account current, and mutually credited the collections, there was a lien upon the paper so transmitted for the balance without regard to who might be the real owner. The first bank, by indorsing the paper in such a manner as to make it appear *prima facie* the property of the failing bank, had no particular equity in its favor.

But this came again before the United States Supreme Court in *Bank of Metropolis v. New England Bank*, 6 How. U. S. 212, where the court lays down its propositions more definitely; that if the collecting bank, at the time of the dealings, had notice that the bill was not the property of the intermediate remitting bank, but had been merely sent by them for collection as agent for some other bank, then the collecting bank had no right to retain for any balance due from the intermediate bank which had failed; even if the collecting bank had no notice, they could not retain as against the real owner, unless credit had been given to the inter-

mediate remitting bank, or what was equivalent, balances suffered to remain to be met by such paper; but if the latter was the case, and they had treated the intermediate bank as the owner, and had no notice, then they might retain.

And there are further explanations of the decision in *Wilson v. Smith*, 3 How. U. S. 763, 769. And see it criticised and restricted in *McBride v. Farmers' Bank of Salem*, 25 Barb. S. C. 657, 661, which case was affirmed on appeal in *McBride v. Farmers' Bank*, 26 N. Y. 450. See also *Reeves et al. v. State Bank*, 8 Ohio St. 465; *Jones v. Milliken & Son*, 41 Pa. St. 252; *Dickerson v. Wasson*, 54 Barb. S. C. 230; also in 47 N. Y. 439. There are some cases going still further in favor of the original remitting bank, and allowing parol evidence to show the fact. *Lawrence v. Stonington Bank*, 6 Conn. 521, and cases there cited; *Bank of Washington v. Triplett & Neale*, 1 Pet. 25; *Commercial Bank of Clyde v. Marine Bank*, 3 Keyes, 337; also in 1 Ab. Ct. App. Dec. 405.

A general indorsement of bills is *prima facie* evidence of property in the indorsee, and even where it is subject to any equity or trust between former parties, may change the legal property as to *bona fide* holders for value. *Collins v. Martin*, 1 B. & P. 648. But even where there is a general indorsement of paper sent only for collection, it will still remain the property of the sender as to all persons having notice.

The counsel for the plaintiffs say that the present case would come under the head of what is in some places denominated a "short entry." It would seem that in London it was a custom (*Giles et al. v. Perkins, et als.*, 9 East, 12, and counsel *arguendo* in *Ex parte Thompson*, 1 Mont. & Mac. 102, 110) for bankers to receive bills for collection and to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected; and this was called a "short entry," or "entering short." And such bills always continued the property of the customer, unless the contrary was to be inferred from some course of dealing. Whereas country bankers in England generally credited to their customers at once all bills considered good, and generally allowed drafts upon the proceeds. And even in the latter cases Lord Ellenborough held such bills did not pass to the assignees in bankruptcy, if there was a balance in favor of the customer over and above the bills. (*Giles et al. v. Perkins et als.*, 9 East 12; *Ex parte Harford*, 2 Rose, 163.) But Lord Eldon held that where they were with the knowledge of the customer entered as cash, and the customer was

entitled to draw against them, he could not claim the specific bills. (*Ex parte Sargeant*, 1 Rose, 153; *Ex parte Thompson*, 1 Mont. & Mac. 102, A. D. 1828.) But even where the custom was to enter short and it was not done, this would not change the property, unless some act of the customer concurred. (*Ex parte Sargeant*, 1 Rose, 153; *Ex parte Pease*, 1 Rose, 232; and the Vice-Chancellor's opinion in *Ex parte Thompson*, 1 Mont. & Mac. 102, 112).

But besides the ground that this was equivalent to a short entry, and that the cases decided upon that point apply to it, it is contended that in this case the effect of the restriction in the indorsement was to give all subsequent holders express notice of the trust, and we think this view of the plaintiff's counsel is correct.

The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent. (*Ex parte Sargeant*, 1 Rose, 153.) The very mode of indorsement in this case shows that it is not a case of ordinary indorsement, and that no consideration has been paid for it. (*Eadie & Laird v. E. India Co.*, 1 W. Bla. 295; also in 2 Burr. 1216.) The bill must be taken by the holder subject to the trust; and, says Judge Story (On Agency, § 211), if he voluntarily consents to or aids in any other appropriation he is responsible; and says Judge Byles (On Bills, *157), he holds the bill or money as trustee for the restraining party, and is liable to the party making the restriction. The words are notice that the restricted indorsee has no property in the bill; that he is a mere trustee, and that he can appoint no sub-agent except for the purpose of holding the bill or money on the same trust, and if the holder pays it to the intermediate agent, he becomes responsible for its misapplication.

In the case of *Sigourney v. Lloyd et als.*, 8 B. & C. 622; also in 3 M. & R. 58, and in Dan. & Ll. 132; 2 Chitty Jun. on Bills, 1412, 1439, it was contended that an indorsement, "Pay to B. for my use," was a mere direction to B. as to the application of the money; but Lord Tenterden said that if it meant no more the words were useless; as he would be so liable without those words.

In that case the payee indorsed generally to A. A., the plaintiff, indorsed, "Pay B. or order for my use;" the defendants discounted it and applied it to the credit of B. B. failed, and it was held that the indorsement was sufficient notice to prevent its transfer for the benefit of any other person; that all subse-

quent indorsees were trustees for the plaintiff; and that whoever advanced any money on it did it at his peril. And on appeal this judgment was confirmed by the Exchequer Chamber, the court holding that the money to whomsoever paid was in trust for the indorser. (*Lloyd et al. v. Sigourney*, 5 Bing. 525; also in 3 M. & P. 229, and 3 You. & Jer. 220, and Dan. & Ll. 213).

This custom of restricted indorsing is not of late origin, but is spoken of as usual in *Snee et al. v. Prescott et als.*, 1 Atk. 245, 249, A. D. 1743; the object being, as there stated, to prevent the indorsement being filled up in such a manner as to pass the interest in the bill.

If the defendants in the present suit had paid the cash to Jay Cooke before hearing of the failure, it would have presented a different question. But they had no right to apply the money of the plaintiffs to the payment of a debt due to them (the defendants) from Jay Cooke. This is not such a payment as can protect them against a suit by the plaintiffs, the real owners. (*Truetel v. Barandon*, 2 Chitty Jun. on Bills, 1002; also in 8 Taunt. 100, and 1 Moore, 543; *Thompson v. Giles*, 2 Chitty Jun. on Bills, 1190; also in 2 B. & C. 422, and 3 D. & R. 733; Lloyd's note to Paley, quoted in full in Story on Agency, § 228, n.; 1 Bell's Comm. *270, which work is praised by Mr. Warren as being a "mine of commercial law."

Judgment for plaintiffs.

INDORSEMENT WITHOUT WORDS OF NEGOTIABILITY. § 38—3.

Leavitt v. Putnam. (See page 97.)

INDORSEMENT BY PARTNERS.

§ 43.

Estabrook v. Smith (1856), 6 Gray, 570, 66 Am. Dec. 443.

Action of contract upon a promissory note, made by the defendant, payable to "Estabrook & Richmond or order," and indorsed by Richmond in his own name, for the purpose of transferring his interest therein to his copartner, Estabrook, the plaintiff. The parties submitted to the decision of the court the

question, whether this indorsement was sufficient to enable the plaintiff to maintain an action thereon in his own name.

D. Foster, for the plaintiff.

E. Washburn, for the defendant.

DEWEY, J. We take the rule to be uncontroverted, that a promissory note payable "to A. B. or order" cannot be transferred, so as to give a right of action in the name of a holder, not the original party, without an indorsement by the payee. The application of this principle seems to be decisive against the right of the plaintiff alone to maintain this action. The action is brought by Estabrook upon a note made to a copartnership, Estabrook & Richmond, promising them, by the name of their copartnership, to pay them or order a certain sum of money. That this action cannot be maintained by the plaintiff, as payee of the note, is obvious; as that would at once present a case where there was an omission to join all the payees as plaintiffs, which would be fatal to the action. The only question therefore, is, whether this note is legally indorsed, so as to enable the plaintiff to maintain the action as indorsee?

The payees of the note are Estabrook & Richmond, who compose a partnership. An indorsement of the note by the payees would therefore be an indorsement by Estabrook & Richmond, and this would correspond with the form of the note, and transfer the same to their indorsee. One partner might properly transfer the note by indorsement, but he must do it by indorsing the partnership name. Any thing less than this seems to be an irregularity, and a departure from the legitimate mode of transfer of a negotiable note or bill, payable to the order of a copartnership.

It is not contended that the indorsement by Richmond alone would have been sufficient to authorize an action in the name of a third person as indorsee; but it is urged that such indorsement is sufficient to authorize an action by the other partner, Estabrook, as indorsee. The position taken is, that Richmond, by his indorsement, has parted with all his interest, and so vested the entire note in Estabrook. This may be all true as between Richmond and Estabrook, and might be quite sufficient to settle, as between them, to whose use this money was to be held when collected. But the question still recurs, as to the effect of such an indorsement as against the maker of the note, and whether it creates the legal relation of indorsee. As already remarked, the present action, if maintainable at all, is maintainable by Estabrook as indorsee of the note. To constitute a legal indorsement, the

payees, Estabrook & Richmond, must be the indorsers. But no such indorsement has ever been made. No one has professed to indorse the note in the partnership name. The only indorsement is that of Richmond individually; and although it might be quite competent for the payees, Estabrook & Richmond, in their partnership name, to have indorsed it to Estabrook, yet they have not done so.

We have found no authority for maintaining an action by an indorsee under such circumstances. The case of *Goddard v. Lyman*, 14 Pick. 268, which seems to be the most favorable case cited to sustain the position taken by the plaintiff, was widely different from the present case. In that case, although the original indorsement was by two only of three payees, and made to the other payee and a third person, yet it was subsequently indorsed by the third payee, and came to the hands of the plaintiff, who instituted the suit with the indorsement of all the payees. That case, upon its facts, does not therefore furnish any precedent for this case; although some of the remarks, as found in the opinion of the court, might seem to indicate a broader doctrine than the case required.

The plaintiff then had leave to amend, on terms, by joining the other partner, and had judgment for the amount of the note.

INDORSEMENT BY JOINT PAYEES NOT PARTNERS. § 43.

Dwight v. Pease (1842), 3 McLean, 94, Fed. Cas. No. 4217.

Mr. Talbot, for defendants.

OPINION OF THE COURT. This action was brought upon the following promissory note:

"DETROIT, January 1st, 1837.

"Two years after date, I promise to pay to the order of Walter Chester, and Pease, Chester & Co. one thousand and five hundred dollars, for value received, at the Farmers' & Mechanics' Bank of Michigan, with interest.

"[Signed] JOHN CHESTER."

Indorsed: "Pease, Chester & Co. and also D. E. Jones in blank."

The declaration contained three counts, to the first of which there was a demurrer. This count states that one John Chester,

on the 1st of January, 1837, made his note payable to order of Walter Chester, and Pease, Chester & Co., and that Pease, Chester & Co., under their partnership name, indorsed and delivered the said note to the plaintiff. John Chester, the maker, was a member of the firm of Pease, Chester & Co. Demand of the note when due, and notice to the defendants, was proved. Walter Chester, one of the promisees in the note, seems not to have indorsed it, and this is fatal to the right of the plaintiff. The interest of the promisees is joint in the note, and not being in partnership, they must each transfer the note. (Chit. Bills, 123; Tayl. 55, *Carvick v. Vickery*, 2 Doug. 653; *Jones v. Radford*, 1 Camp. 83, note, 21 E. C. L. 41.) Only one-half of the note was transferred by the indorsement of Pease, Chester & Co., and this does not give a right to their or any subsequent assignee to sue on the note. Recourse against the maker cannot thus be divided and suits multiplied. The plaintiff seeks by this action to recover the full amount of the note against the defendants, as indorsers. But as he holds but one-half of the note under the assignment, the indorsement, at most, can only be evidence of that amount. The declaration is defective in not averring that Walter Chester, one of the payees, did indorse the note.

Demurrer sustained. The plaintiff dismissed his action.

INDORSEMENT BY CASHIER OF BANK.

§ 44.

Folger et al. v. Chase et al. (1836), 18 Pick. (Mass.) 63.

This was assumpsit against the executors of Joseph Chase to recover the amount of three promissory notes.

The first note, dated April 11th, 1825, was made by E. Dixon, for the sum of \$867, payable to the order of the testator at the Phoenix Bank in Nantucket, on demand, with interest, and was indorsed by the testator to the President, Directors and Company of the Phoenix Bank, the testator expressly waiving all right to notice as such indorser. Upon a separate paper, annexed to this note by a wafer, was the following indorsement: "P. H. Folger, Cashier."

The second note, dated January 18th, 1830, was made by James Barker, for the sum of \$1,235.92, and was payable to the order of the testator, at the Phoenix Bank, on demand, with interest. The third note, dated September 21st, 1832, was made by the testator, for the sum of \$358.31, payable to the order of Edward Chase, at the Phoenix Bank, on demand, with interest. These

two notes were indorsed by the respective payees and by "P. H. Folger, Cashier," the payees expressly waiving all right to notice as indorsers.

WILDE, J., delivered the opinion of the Court.

This was an action on three promissory notes of hand, on two of which the defendants are sued as executors of an indorser, and they object to the plaintiffs' recovery on these notes, on the ground that no demand has been made on the makers and no diligence used to collect the debts of them. These notes, however, were made payable at the Phoenix Bank, and were the property of the bank. No demand was necessary except at the bank; and although there is no express proof that the notes were there, and some officer of the bank in attendance, at the time the notes fell due, yet this must be presumed, and it was for the defendants to show that the makers called at the place appointed, for the purpose of making payment. The testator, by his indorsements, guaranteed that the makers would respectively be at the bank and pay the notes according to their tenor. (*Berkshire Bank v. Jones* 6 Mass. R. 525).

In the next place it is objected, that the bank had no authority to indorse the notes in question, as the indorsement was made after the charter of the bank had expired by its own limitation; and that the bank had no power to sell or indorse their notes by virtue of St. 1819, c. 43. That statute provides, that all bodies corporate and politic, whose powers would expire, either by express limitation in their charters of incorporation, or otherwise, should be continued bodies corporate and politic, for the term of three years from and after the day on which their powers would expire, for the purpose of prosecuting and defending all suits, and of enabling them to settle and close their concerns and divide their capital stock; but not for the purpose of continuing their business.

This is a just and wise remedial law, and ought to be liberally expounded. By the principles of the common law, upon the civil death of a corporation, all its real estate remaining unsold, reverts back to the original grantor and his heirs; and the debts due to and from the corporation are extinguished. The object of the statute was effectually to guard against the inequitable consequences of this rule of the common law. Now it appears, that within three years after the expiration of the charter of the bank these notes were indorsed, and we think the bank had competent authority, by virtue of the statute, to make the indorsements. The

notes not having been collected, the bank had clearly a right to sell them, or to dispose of them in any other reasonable and proper manner, so as to wind up their concerns. The bank clearly had a right to transfer the notes to the plaintiffs, and it is no concern of the defendants how the money, when collected, is to be disposed of.

As to the objection, that the indorsement is not made in the name of the corporation, we think the indorsement by the cashier in his official capacity sufficiently shows, that the indorsement was made in behalf of the bank, and if that is not sufficiently certain, the plaintiffs have the right now to prefix the name of corporation.

The last objection is, that the indorsement on one of the notes was not made on the back of the original note, and therefore amounted only to an equitable transfer. The indorsement was made on a paper attached to the back of the note by a wafer, and it had been before thus attached for the purpose of entering thereon indorsements of payments, the back of the original note having been before covered with indorsements; and several payments had been indorsed on the attached paper, before the note was transferred by indorsement to the plaintiff. This paper thus attached had become a part of the note, and no good reason can be given why an indorsement made thereon should not be held a valid and legal transfer. The objection is, that such an indorsement is not sanctioned by custom; but we think it is supported by the reasons on which the custom was originally founded. Bills of exchange and promissory notes were indorsed on the back of the bills and notes, because it was a convenient mode of making the transfer, and in order that the evidence thereof might accompany the note. Such an indorsement as this will rarely happen, and no authority to support it could reasonably be expected; but there is no authority against it.

If a person write his name on a blank paper, to be used as an indorsement of a note to be written on the other side, and it be filled up as intended, the party would be held liable as indorser of the note, although such indorsements are infrequent, and are not according to the customary form of making a transfer; but they have been held to be within the reason of the custom, and are supported by principle. (*Bayley on Bills*, 92; *Violet v. Patton*, 5 Cranch, 142).

So in the present case, as there is no authority against the validity of the indorsement, we think we shall violate no principle in holding it to be a legal transfer of the note.

Judgment for the plaintiffs.

CONTINUATION OF NEGOTIABLE CHARACTER OF INSTRUMENT. § 49.

Leavitt v. Putnam.. (See page 97.)

TRANSFER OF INSTRUMENT WITHOUT INDORSEMENT. § 51.

Osgood's Adm'rs v. Artt (1883), 17 Fed. 575.

At Law.

W. H. Swift, for plaintiffs.

Edsall, Hawley & Edsall, for defendant.

HARLAN, Justice. On the fourteenth day of May, 1856, the defendant, Artt, executed and delivered to the Racine & Mississippi Railroad Company his note, whereby, for value received, he promised to pay to that company or order, at the expiration of five years from May 10, 1856, the sum of \$2,500, together with interest at the rate of 10 per cent per annum, payable annually on the tenth day of May of each year,—principal and interest payable at the office of the company in the city of Racine, Wisconsin. At the same time, Artt, to secure the payment of the note, executed to the company his mortgage upon certain real estate in Carroll county, in this state. Subsequently, the company made its bond, under date of June 10, 1856, acknowledging its indebtedness to and promising to pay Charles Osgood, or bearer, \$2,500 on the tenth of May, 1861, at its office in the city of New York, together with interest from and after the tenth day of May, at the rate of 10 per cent per annum, payable semi-annually on each tenth day of November and May, upon the presentation and surrender of the interest coupons at the said office. That bond contained these clauses:

"To the payment whereof the said company hereby bind themselves firmly by these presents; and, for the better security of such payments being made to the holder thereof, the said company *have assigned and transferred*, and *by these presents do assign and transfer*, to the said holder of this bond a certain note for the sum of \$2,500, executed by Robert Artt, of Carroll county, together with a mortgage given collateral to and for the purpose of securing the payment of the same, dated on the fourteenth day of May, 1856, payable in five years from the tenth day of May, 1856, with interest at the rate of 10 per cent per annum, which said note and mortgage are hereto appended, and *are trans-*

ferable in connection with this bond, and not otherwise, to any parties or purchasers whomsoever. And the said company do hereby authorize and empower the holder of this bond at any time, in case said company shall fail to perform any of the foregoing stipulations by neglecting to pay either principal or interest on this bond when the same shall become due, to proceed and foreclose the said mortgage, or take such other legal remedy on said note and mortgage against said mortgagor, or against this company on this present bond, or on both, as shall seem proper and expedient to said holder hereof."

Some time in the summer of 1857 the railroad company sold the bond, delivering therewith the note and mortgages to plaintiffs' intestate,—the bond, note, and mortgage being attached firmly together with eyelets in the order in which they are named, the bond on the top, next the note, and then the mortgage. The bond, note, and mortgage each bears the number 1,964 written thereon in ink. At the time of such purchase and delivery Osgood had no notice of any defense to the note, nor of any of the matters alleged in defendant's third plea. That plea states facts which are conceded to show a good defense as between Artt and the railroad company, viz., an entire failure of consideration, and also fraud, upon the part of the company, in procuring the execution of the note and mortgage. The note, bond, and mortgage, after their delivery to deceased, remained attached in the manner just stated. Upon the back of the note are the words "Racine & Mississippi Railroad Company, by H. S. Durand, President," which is the indorsement of the railroad company, placed thereon by its authority. It had not, however, been placed there when Osgood purchased and received the note, bond, and mortgage, but was made at some date subsequent to June, 1859. Before the indorsement was, in fact, made on the note, but after the purchase by Osgood, he had notice as well of the fraud practiced by the railroad on Artt, as of the failure of consideration in the note, as set out in the defendant's third plea.

These facts have been specially found by a jury, and the sole question for determination is whether, upon this finding, the plaintiffs are entitled to judgment. The only issue of fact made on the third plea is whether Osgood, prior to the indorsement of the note, had notice of the alleged fraud and failure of consideration.

1. It is a settled doctrine of the law-merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee.

2. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law-merchant, only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and, in the absence of defense by the payor, may demand and receive the amount due, and, if not paid, sue for its recovery, in the name of the payee, or in his own name, when so authorized by the local law.

3. As a general rule the legal title to negotiable paper, payable to order, passes, according to the law-merchant, only by the payee's indorsement on the security itself. The only established exception to this rule is where the indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become part thereof, or be incorporated into it. This addition is called, in the adjudged cases and elementary treatises, an *allonge*. That device had its origin in cases where the back of the instrument had been covered with indorsements, or writing, leaving no room for further indorsements thereon. But, perhaps, an indorsement upon a piece of paper, attached in the manner indicated, would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument.

4. But neither the general doctrines of commercial law, nor any established exception thereto, make words of mere assignment and transfer of such paper—contained in a separate instrument, executed for a wholly different and distinct purpose—equivalent to an indorsement within the rule, which admits the payor to urge, as against the holder of an unindorsed negotiable security, payable to order, any valid defense which he has against the original payee.

5. The transfer of the note in suit, by words of assignment in the body of the railroad company's bond, did not, in the judgment of the court, amount to an indorsement of the note, although the bond, note, and mortgage were originally fastened together by eyelets. The facts set out in the third plea, and sustained by the special finding, constitute, therefore, a complete defense to the action, unless, as contended by plaintiffs, the subsequent indorsement, in form, by the railroad company, after Osgood was informed of Artt's defense, has relation back to the time when the former, without notice of such defense, purchased the note for value then paid. If, at the time of Osgood's purchase, it had

been agreed that the company should *indorse* the note, but the indorsement was omitted by accident or mistake or fraud upon the part of the company, a different question would have been presented. In such case, the company might, perhaps, have been compelled to make an indorsement which would have been deemed effectual as of the time when, according to the intention of the parties, it should have been made. But no such case is presented by the special finding. It is entirely consistent with the facts found that the indorsement by the company was an afterthought, induced by notice of Artt's defense, and was not within the contemplation or contract of the parties when Osgood purchased the bond. Moreover, and as a circumstance significant of an intention to restrict, in some degree, the assignability of the note and mortgage, it is expressly stipulated, in the company's bond, that they are transferable in connection with the bond, and not otherwise.

I am of opinion that the facts which came to Osgood's knowledge prior to the indorsement, and which, in substance, constitute the defense set out in the third plea, furnished notice that the company had, by reason of fraud and failure of consideration, lost its right to demand payment of the note from Artt. By the indorsement, after such notice, Osgood could not acquire any greater rights than the company possessed. He did not become the holder of the note by *indorsement*, as required by the law-merchant, until after he had notice that the company could not rightfully pass the legal title, so as to defeat Artt's defense.

While the adjudged cases are not in harmony upon some of these propositions, the conclusions indicated are, in the opinion of the court, consistent with sound reason, and are sustained by the great weight of authority. (Chief Justice Marshall, in *Hopkirk v. Page*, 2 Brook. 41; *Sturges' Sons v. Met. Nat. Bank*, 49 Ill. 231; *Melendy v. Keen*, 89 Ill. 404; *Haskell v. Brown*, 65 Ill. 37; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 24; *Bacon v. Cohea*, 12 Smedes & M. 522; *Grand Gulf Bank v. Wood*, Id. 482; *Clark v. Whitaker*, 50 N. H. 474; *Haskell v. Mitchell*, 53 Me. 468; *Franklin v. Twogood*, 18 Iowa 515; *French v. Turner*, 15 Ind. 59; *Folger v. Chase*, 18 Pick. 63; *Whistler v. Forster*, 14 C. B. 246, [108 E. C. L. 248]; *Harrop v. Fisher*, 10 C. B. [N. S.] 196; *Gibson v. Minet*, 1 H. Bl. s. p. 606; Story, Notes, § 120; Story, Bills, § 201; Chitty, Bills, [12th Amer. from 9th Lond.] 252; 2 Pars. Notes & Bills, 1, 17, 18; 1 Daniel, Neg. Inst. [3d Ed.] §§ 664a, 689a, 690, 741, and 748a).

The facts specially found do not authorize a judgment for the plaintiffs.

The Goshen Nat'l Bank v. Bingham et al. (1890), 118 N. Y. 349.

Bingham et al. v. The Goshen Nat'l Bank.

Appeals from judgments rendered by the General Term of the Supreme Court in the first judicial department, entered upon orders made March 31, 1887, which affirmed a judgment in the action first above entitled in favor of defendants and a judgment in action second above entitled in favor of plaintiffs, both of which were entered upon the reports of a referee.

On November 27, 1884, Benjamin D. Brown applied to the cashier of the Goshen National Bank, appellant, at Goshen, N. Y., to cash a sight draft for \$17,000, drawn by him upon the firm of William Bingham & Co., of New York, the individual members of which firm are the respondents, accompanied by a quantity of the bonds of the West Point Manufacturing Company, of the face value of \$17,000. Brown represented that he had negotiated a sale of these bonds at their face value with William Bingham & Co.; that they had directed him to draw upon them at sight for \$17,000, the draft to be accompanied by the bonds, and that the draft would be paid upon presentation. Such representations were absolutely false. The bonds had no market value. Brown was a bankrupt and had no funds in the bank except such as resulted from the credit given him upon the faith of the draft on Bingham & Co., accompanied by the bonds. The cashier of the Goshen National Bank, relying upon such representations, cashed the draft of \$17,000, and placed the proceeds to the credit of Brown upon the books of the bank. He gave Brown sight drafts on New York for \$12,000, and certified a check drawn by Brown to his own order, dated November 26, 1884, for \$5,000. On the morning of November twenty-eight, Brown called at the office of William Bingham & Co., and stated that he wanted to get some currency. Mr. Bingham passed the check to the firm's cashier directing him to give Brown currency for the amount. The cashier gave him a check drawn on the Corn Exchange Bank for \$5,000. Brown had the check cashed at the Corn Exchange Bank. He also had the New York drafts cashed, amounting to \$12,000, which he had obtained from the Goshen National Bank. After procuring the checks and drafts to be cashed, he fled to Canada, where he remained at the time of the trial of these actions. When Bingham & Co. took from Brown the check certified by the Goshen National Bank it was not indorsed.

The referee found in the action second entitled that "at the

time of the transfer of the said certified check by Brown to the plaintiffs, it was intended both by Brown and the plaintiffs that said certified check should be indorsed by Brown, and it was supposed by both parties that he had so indorsed it, and if the plaintiff had known that it was not indorsed they would not have paid the consideration therefor."

He found, in the action second entitled, "that Brown made no statement to the defendants, or either of them, at the time of the transfer of the check that such check was indorsed."

And "prior to the commencement of the action of replevin the defendants never requested Brown to indorse said check."

While Bingham & Co. held the check in question unindorsed, a demand for its return to the bank, accompanied by a full explanation of the circumstances under which the certification was obtained, was made upon Bingham & Co., in behalf of the bank, and upon their refusal to return it, an action to recover its possession was commenced by the bank against Bingham & Co.

That action is, firstly, above entitled.

Subsequently, and on December sixteenth, Bingham & Co. obtained from Brown a power of attorney to indorse the check. Pursuant thereto the check was indorsed and payment thereafter demanded of the bank.

This was refused, and thereupon the action, secondly, above entitled, was commenced by Bingham & Co., to recover the amount of the check.

Henry Bacon, for appellant.

Joseph F. Mosher, for respondents.

PARKER, J. As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a *bona fide* holder to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co. the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud which constituted a defense for the bank as against Brown. Can the recovery had be sustained?

It is too well settled by authority, both in England and in this country, to permit of questioning, that a purchaser of a draft, or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full con-

sideration, without notice of the existence of such equities and defenses. (*Harrop v. Fisher*, 30 L. J. [C. L., N. S.] 283; *Whistler v. Forster*, 14 C. B. [N. S.] 246; *Savage v. King*, 17 Me. 301; *Clark v. Callison*, 7 Ill. 263; *Haskell v. Mitchell*, 53 Me. 468; *Clark v. Whitaker*, 50 N. H. 474; *Calder v. Billington*, 15 Me. 398; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18; *Gilbert v. Sharp*, 2 Lans. 412; *Hedges v. Sealy*, 9 Barb. 214-218; *Franklin Bank v. Raymond*, 3 Wend. 69; *Raynor v. Hoagland*, 7 J. & S. 11; *Muller v. Pondir*, 55 N. Y. 325; *Freund v. Importers & Traders' Bank*, 76 id. 352; *Trust Co. v. Nat. Bank*, 101 U. S. 68; *Osgood v. Artt*, 17 Fed. Rep. 575.)

The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law-merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities, and defenses, which would have rendered them unavailable in the hands of a prior holder.

This rule is only applicable to negotiable instruments which are negotiated according to the law-merchant.

When, as in this case, such an instrument is transferred but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor and may maintain an action thereon in his own name. And like other choses in action it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder.

Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the bank as against Brown, the payee.

Evidence of an intention on the part of the payee to indorse does not aid the plaintiff. It is the act of indorsement, not the intention, which negotiates the instrument, and it cannot be said that the intent constitutes the act.

The effect of the indorsement made after notice to Bingham & Co. of the bank's defense must now be considered. Did it relate back to the time of the transfer, so as to constitute the plaintiffs holders by indorsement as of that time?

While the referee finds that it was intended both by Brown and the plaintiffs that the check should be indorsed, and it was supposed that he had so indorsed it, he also finds that Brown made no statement to the effect that the check was indorsed; neither did the defendants request Brown to indorse it. There was, therefore, no agreement to indorse. Nothing whatever was said upon the subject. Before Brown did agree to indorse the plaintiffs had notice of the bank's defense. Indeed, it had commenced an action to recover possession of the check.

It would seem, therefore, that having taken title by assignment, for such was the legal effect of the transaction, by reason of which the defense of the bank against Brown became effectual as a defense against a recovery on the check in the hands of the plaintiffs as well, that Brown, and Bingham & Co., could not, by any subsequent agreement or act, so change the legal character of the transfer as to affect the equities and rights which had accrued to the bank. That the subsequent act of indorsement could not relate back so as to destroy the intervening rights and remedies of a third party.

This position is supported by authority. (*Harrop v. Fisher*; *Whistler v. Forster*; *Savage v. King*; *Haskell v. Mitchell*; *Clark v. Whitaker*; *Clark v. Callison*; *Lancaster Nat. Bank v. Taylor*; *Gilbert v. Sharp*, cited, *supra*.)

Watkins v. Maule (2 Jac. & Walk. 243) and *Hughes v. Nelson* (29 N. J. Eq. 547) are cited by the plaintiff in opposition to the view we have expressed.

In *Watkins v. Maule*, the holder of a note, obtained without indorsement, collected it from the makers. Subsequently the makers complained that the note was only given as a guarantee to the payee who had become bankrupt. Thereupon the holder refunded the money and took up the note upon the express agreement that the makers would pay any amount which the holders should fail to make out of the bankrupt payee's property. The makers were held liable for the deficiency. *Hughes v. Nelson* did not involve the precise question here presented. The views expressed, however, are in conflict with some of the cases cited but we regard it in such respect as against the weight of authority. *Freund v. Importers & Traders' Bank* (*supra*) does not aid the plaintiff. In that case it was held "that the certification by the bank of a check in the hands of a holder who had purchased it for value from the payee, but which had not been indorsed by him, rendered the bank liable to such holder for the amount thereof. By accepting the check the bank took, as it had a right to do, the risk of the

title which the holder claimed to have acquired from the payee. In such case the bank enters into contract with the holder by which it accepts the check and promises to pay it to the holder, notwithstanding it lacks the indorsement provided for, and it was accordingly held that it was liable upon such acceptance upon the same principles that control the liabilities of other acceptors of commercial paper." (*Lynch v. First National Bank of Jersey City*, 107 N. Y. 183). But one question remains.

The learned referee held, and in that respect he was sustained by the General Term, that the bank by its certification represented to every one that Brown had on deposit with it \$5,000; that such amount had been set apart for the satisfaction of the check, and that it should be so applied whenever the check should be presented for payment, and that Bingham & Co., having acted upon the faith of these representations and having parted with \$5,000 on the strength thereof, the bank is estopped from asserting its defense.

The referee omitted an important feature of the contract of certification. The bank did certify that it had the money; would retain it and apply it in payment, *provided* the check should be indorsed by the payee. (*Lynch v. First National Bank of Jersey City*, *supra*).

If the check had been transferred to plaintiffs by indorsement the defendant would have had no defense, not because of the doctrine of estoppel, but upon principles especially applicable to negotiable instruments. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 638).

If the maker or acceptor could ever be held to be estopped by reason of representations contained in a negotiable instrument he certainly could not be in the absence of a compliance with the provisions upon which he had represented that his liability should depend.

But it is well settled that the maker or acceptor of a negotiable instrument is not estopped from contesting its validity, because of representations contained in the instrument. In such cases an estoppel can only be founded upon some separate and distinct writing or statement. (*Clark v. Session*, 22 N. Y. 312; *Bush v. Lathrop*, 22 id. 535; *Moore v. Metropolitan Bank*, 55 id. 41; *Fairbanks v. Sargent*, 104 id. 108; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, *supra*).

The views expressed especially relate to the action of Bingham & Co. against the bank and call for a reversal of the judgment.

We are of the opinion that the action brought by the bank against Bingham & Co. to recover possession of the check cannot be maintained, and in that case the judgment should be affirmed.

All concur, except HAIGHT J., not sitting.

Judgments accordingly.

TRANSFER BY DELIVERY.

§ 32.

Bitzer v. Wagar (1890), 83 Mich. 223.

Error to Oceana. Dickerman, J.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

W. E. Ambler, for appellant.

Fred J. Russell, for plaintiff.

LONG, J. This action was brought in the circuit court for Oceana county, upon a promissory note reading as follows:

"\$100.00.

HART, MICH., March 20, 1889.

"Eight months after date I promise to pay to the order of Marget A. Bitzer (or bearer) one hundred dollors, at the Oceana County Savings Bank, value received, with interest at the rate of 6 per cent.

"BERT SPELLMAN.

"G. A. WAGAR."

On the trial the plaintiff had judgment. Defendant brings error on the ground:

2. That the court erred in admitting in evidence the note in question, for the reasons—

a—That the note is payable to the order of Marget A. Bitzer, and has never been indorsed or transferred by her to plaintiff, and the title and ownership is still in Marget A. Bitzer, and not in plaintiff.

b—That said note is not competent evidence, for the reason that plaintiff has not shown that he owns or has property in said note.

The note is plainly payable to bearer, and suit could be maintained thereon in the name of any holder.

The judgment must be affirmed, with costs.

The other justices concurred.

Day v. Longhurst. (See page 268.)

SECTION VII—CONTRACT OF SECONDARY PARTIES.

CONTRACT OF THE DRAWER.

§ 63.

Whitehead v. Walker (1842), 9 M. & W. 505.

Assumpsit by the endorsee against the endorser of a foreign bill of exchange. The declaration stated, that heretofore, to wit, on the 8th of August, 1834, and before the bankruptcy of Benbow, in parts beyond the seas, certain persons made their bill of exchange in writing directed to Messrs. Grayhurst and Company, and thereby requested them to pay to the defendant, ninety days after sight, 721l. os. 3d. value received: that the defendant endorsed the said bill to W. Swainson, who endorsed it to Willis & Co., who endorsed it to Benbow; and that the said Grayhurst & Co. had sight of the said bill, but *had not paid* the same. To this declaration there were various pleas, the 8th of which was as follows:

8th.—That before the said bill became due, or was presented for payment, and after the endorsement to Willis & Co., and before the endorsement to Benbow, the bill was presented to Grayhurst & Co. for their acceptance, but that they refused to accept the same, and the bill was thereupon protested for non-acceptance; and that the defendant had not due notice of the non-acceptance of the bill, or of its having been so protested; and that Benbow, as well as Willis & Co., at the time of the said endorsement to Benbow, had notice that the bill had been so presented for acceptance, and refused and protested for non-acceptance.

Verification—

To the 8th plea, the plaintiff replied *de injuria*.

The judgment of the court was pronounced by

PARKE, B. The question raised by the pleadings in this case is, whether, if the endorsee of a foreign bill of exchange has presented it for acceptance, and (acceptance having been refused) has duly presented it and given notice to the drawer, (for the defendant, the endorser, is in the same situation), and so has acquired a right of action against him by reason of the non-acceptance, a new right of action afterwards accrues to him on the subsequent presentment of the bill for payment, and non-payment according to its tenor. The plaintiffs, indeed, are not the endorsees who

presented the bill, but they are averred to have taken the bill with notice of the fact of presentment and dishonour, and therefore stand in the same situation, and are not to be considered as having a title as innocent endorsees. (*Dunn v. O'Keefe*, 5 M. & Selw. 282). The practical importance of the point in the present case arises from the delay of the holder in bringing his action. The non-acceptance and the protest thereon occurred in September, 1834. The bill, according to its tenor, would not be payable till the subsequent month of December, and this action was commenced in November, 1840; so that if a right of action accrued in December, 1834, the Statute of Limitations cannot be successfully pleaded; whereas, if there was no right of action accruing subsequently to the protest for non-acceptance in September, 1834, the statute is a bar.

On the part of the plaintiff it was contended, that although he undoubtedly might have brought an action in the month of September, 1834, founded on the non-acceptance, yet it was optional with him to do so or not; that he might, if he thought fit, waive that action, and proceed merely on the ground of the subsequent non-payment in December, 1834. For the drawer of a bill, it was contended, enters into a double engagement with the payee, and through him with the successive holders of the bill, namely, *first*, that the drawee shall accept the bill when regularly presented to him for acceptance; and *secondly*, that he shall pay the bill when regularly presented to him for payment. And if this be a correct representation of the engagement entered into by the drawer, the conclusion seems unavoidable, that whatever right of action the holder might have acquired by the non-acceptance, he certainly is not precluded from suing in respect of the default of payment. But we are of opinion that the contract entered into by the drawer is not such as is contended for by the plaintiff, and that he in fact enters into one contract only; namely in the case of a bill made payable after sight, that the drawee shall, on the bill being presented to him in a reasonable time from the date, accept the same, and having so accepted it, shall pay it when duly presented for payment according to its tenor; and in the case of a bill payable after date, that the drawee shall accept it if it is presented to him before the time of payment, and having so accepted it, shall pay it when it is in due course presented for payment; or if it is not presented for acceptance at all, then that he shall pay it when duly presented for payment.

The counsel for the plaintiff, in support of his view of the law, relied mainly on some passages which he cited from the work of

Marius on Bills of Exchange, some of which are adopted in Comyns' Digest, tit. "Merchant," (F. 8.) & (F. 9). But with respect to those passages, we must remark that the work of Marius, though undoubtedly one of authority in its way, is scarcely to be looked at as a legal treatise on the subject of bills of exchange. It is, as its title imports, a work giving good practical advice from a practical man to persons receiving and negotiating bills of exchange. The author was a public notary, who lived in the middle of the seventeenth century, when questions of mercantile law were much less perfectly understood than they are now. In some of his notions he was clearly mistaken; as for instance, he considers the holder of a bill of exchange to be in all cases bound to present it for acceptance; and it seems very doubtful whether he supposed the effect of non-acceptance to be anything more than of rendering it incumbent on the drawer to find better security for the satisfaction of the holder. It is not, however, absolutely necessary to decide that Marius is wrong, for he nowhere lays down the proposition now insisted on, namely, that after a protest for non-acceptance, a second right of action accrues to the holder on the non-payment. He speaks, indeed, of the holder retaining the bill after non-acceptance, and applying for payment, and suing on default of payment; and this, as a matter of prudence, may probably be the wisest course which a party can pursue. In spite of the non-acceptance, the drawer still may pay the bill when at maturity, and the holder having by protest and notice on non-acceptance put himself in a condition to sue the drawer, may very reasonably, as a matter of prudence, retain the bill, and endeavour to obtain payment when the bill is at maturity, and not involve himself in litigation until there has been a failure of payment as well as of acceptance. It by no means, however, follows, because this is spoken of as being, what probably it still is, the usual course, that any second right of action arises on the second default. For let us consider what is the nature of the right which the holder acquires on the default of the drawee to accept. It is clear (whatever might formerly have been considered on the subject) that by the non-acceptance, followed by the protest and notice, the holder acquires an immediate right of action against the drawer—a right of action, be it observed, not in respect of any special damage from the non-acceptance, but a right of action *on the bill*, i. e., a right of action to recover the full amount of the bill. The effect of the refusal to accept is, (according to the language of the Court of King's Bench in *Macarty v. Barrow*, as quoted by C. J. Wilmut, in 3 Wils. 16), that the drawee says to the holder, "I will not pay

your bill; you must go back to the drawer, and he must pay you." The holder thus acquires by the non-acceptance the most complete right of action against the drawer which the nature of the case admits, and no subsequent act or omission of the drawee can give him a more extensive right against the drawer than he has already acquired. But further, on failure of acceptance, the holder is bound to give immediate notice to the drawer, and if he omits to do so, he forfeits all right of action against him, not only in respect of the default of acceptance, but also in respect of the subsequent non-payment. Now it is very difficult to reconcile this doctrine with the notion that a new right of action arises from the non-payment; for if that were so, it could hardly be that such new right of action could be destroyed by the previous neglect to give notice of a matter unconnected with that out of which the second right of action is supposed to arise. The argument of the plaintiffs must be, that a second right of action on the bill arises from the default of payment in those cases only in which the holder has duly given notice of the non-acceptance, i. e., in those cases only in which the holder, by the hypothesis, must have already acquired a right of action precisely similar to and co-extensive with that which is thus supposed to vest in him by the default of payment. This seems to us to be a proposition so much fraught with inconsistency, and so entirely destitute of principle and authority, that we cannot hold it to be law. It may be added, that if the law were as is contended for the plaintiffs, this inconvenience would follow, that the holder of a bill might at the same time be prosecuting two actions on the same bill against the same party, for the recovery of precisely the same sum.

On these grounds we are of opinion that there must be judgment for the defendant on the demurrers to his 7th and 9th pleas. With regard to the 8th plea, we think the replication *de injuriâ* is good, and judgment on that plea will therefore be for the plaintiffs.

Judgment accordingly.

ADMISSIONS OF THE DRAWER.

§ 63.

Kohn et al. v. Watkins (1882), 26 Kan. 691.

Error from Douglas District Court.

Action brought by Solomon H. Kohn, Morris Kohn, and M. W. Levy, partners as Kohn Brothers & Company, against Watkins, upon certain drafts, copies of which are as follows:

- No. 6639. *Office of J. B. Watkins & Co.,*
LAWRENCE, KAS., April 20, 1880.
Pay to the order of Geo. W. Cobb, three hundred and fifty-five dollars. J. B. WATKINS & Co.
\$355. To Merchants' Bank, Lawrence, Kas.
[Indorsements:] Pay to the order of R. G. McLain.
GEO. W. COBB.
R. G. McLAIN.
- No. 6652. *Office of J. B. Watkins & Co.,*
LAWRENCE, KAS., April 21, 1880.
Pay to the order of Michael A. Becker, three hundred and fifty-five dollars. J. B. WATKINS & Co.
\$355. To Merchants' Bank, Lawrence, Kas.
[Indorsements:] Pay to the order of R. G. McLain.
MICHAEL A. BECKER.
R. G. McLAIN.
- No. 6656. *Office of J. B. Watkins & Co.,*
LAWRENCE, KAS., April 21, 1880.
Pay to the order of Henry Greer, four hundred and forty-four dollars. J. B. WATKINS & Co.
\$444. To Merchants' Bank, Lawrence, Kas..
[Indorsements:] Pay to the order of R. G. McLain.
HENRY GREER.
R. G. McLAIN.

Plaintiffs alleged in their petition that they are the *bona fide* holders and owners of said drafts; that they paid a valuable consideration therefor, and that they are wholly unpaid.

The further facts sufficiently appear from the opinion.

Sluss & Hatton, for plaintiffs in error.

R. J. Borgholthaus, W. J. Patterson, and John Hutchings, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J. Upon the record of this case two different questions are presented for our decision. The first is, whether a draft or bill of exchange payable to a real person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it is to be paid, must bear the genuine indorsement of such payee in order that a *bona fide* indorsee may recover thereon, when such bill has been drawn without the knowledge or consent of the person named therein as payee through the false representations of a party forging the

indorsement, who obtains it from the drawer by fraud and without consideration? Second, if a drawer be induced by the fraudulent representations of a party seeking to defraud him, to make a draft or bill of exchange payable to a fictitious person, not knowing the payee to be fictitious when he makes the bill and intending that such bill shall be payable to a real person, may the *bona fide* holder thereof recover on it against a drawer as upon a bill payable to a fictitious payee?

The first inquiry arises upon the findings of the trial court in relation to the bill payable to the order of Michael A. Becker. It appears that he was a former resident of Kingman county, and therefore a person *in esse*; that his name was forged to an application transmitted to Watkins by R. G. McLain without the knowledge or consent of Becker, asking for a loan of money upon premises purporting to be situated in Kingman county. It further appears that the defendant accepted the application transmitted by McLain, believing it to be genuine, and undertook to loan thereon the sum of \$400, less commissions, and sent McLain a blank note and mortgage together with the draft; that McLain forged the name of Becker upon the draft, indorsed thereon his own name, and negotiated the same, and received from the plaintiffs the money therefor. The plaintiffs received the draft in the usual course of trade, and paid full value. It is argued by counsel for plaintiffs, that as to this draft Becker is to be deemed a fictitious person, because he had no knowledge of the draft, and no interest or concern in it. We do not think the position sound. The statute prescribes that to make a bill of exchange drawn payable to order negotiable, it must contain the indorsement of the person therein named as the payee. (Comp. Laws 1879, ch. 14, § 1). And we suppose that counsel for defendant will concede, as a general rule, that the plaintiffs could not recover as the indorsees of the note without proving the indorsement of the payee. Now while the authorities hold that when the drawer or maker of a bill of exchange knows that the payee is a fictitious person at the time he makes the draft, that a *bona fide* holder may recover on it against him as upon a bill payable to bearer; and, while some of the authorities hold that it will be no defense against a *bona fide* holder for the maker or drawer to set up that he did not know the payee to be fictitious, yet none of these authorities sustain the doctrine that if the payee be a real person, and such person was present to the mind of the maker or drawer when he made the draft as the party to whose order it is to be paid, a recovery can be had thereon without the genuine indorse-

ment of the payee upon the mere indorsement of the party who induced the drawer to make the bill by fraudulent representations. Nor can such bill be considered as one running to a fictitious payee, and as if drawn payable to bearer. If the principle contended for by counsel be adopted, it would be wholly immaterial whether the indorsement is genuine or not, so far as to give to the instrument the character of negotiable paper when the indorser himself is not actually sued. For it would always be open to the dilemma, if he is a party, it is a genuine indorsement; if he is not, he is a fictitious payee and no indorsement is necessary. (*Dana v. Underwood*, 19 Pick. 99; *Rogers v. Ware*, 2 Neb. 29). In our opinion, the indorsement on the draft to Becker is a clear forgery, and the holders, however innocent, cannot recover from the drawer.

The second inquiry presents more difficulty. No such persons as Henry Greer or Geo. W. Cobb, the payees mentioned in two of the drafts, resided in Kingman county, or owned land as purported by the applications transmitted by McLain. These payees are fictitious. The finding upon this matter is, that these applications (for loans) are wholly false and fraudulent, and were manufactured by McLain with the design and for purpose of obtaining money thereon fraudulently. In the draft to Becker, a real person was inserted as payee at the instance of McLain; but in the drafts to Greer and Cobb, fictitious names were transmitted by McLain, and such names adopted by the drawer from the applications so received by him from McLain; and these drafts, therefore, are not payable to persons *in esse*. Although the defendant made the bills in ignorance of the fact that these parties named as payees had no existence, yet, taking all the circumstances of the transaction together, we think the drafts to Greer and Cobb are controlled by the line of decisions respecting bills and notes made payable to fictitious payees. Daniel on Negotiable Instruments, § 139, says:

"In the case of a note payable to a fictitious person, it appears to be well settled that any *bona fide* holder may recover on it against the maker as upon a note payable to bearer. It will be no defense against such *bona fide* holder for the maker to set up that he did not know the payee to be fictitious. By making it payable to such person he avers his existence, and he is estopped, as against the holder ignorant of the contrary, to assert the fiction."

The authority to sustain the rule announced is, *Lane v. Krekle*, 22 Iowa, 399. This authority, so far as the actual points

necessary to have been decided in that case, hardly goes so far as the text of the author, because the note in that action was made payable to bearer, and Dillon, J., remarks at the commencement of the opinion, "That this fact relieves the case of some difficulties that would arise were it payable to the person named, or order." Yet that learned judge, in the opinion, presents a strong argument in support of the proposition stated by Daniel. He says:

"Upon reason and principle we are clear that, if the plaintiff is a *bona fide* holder for value and without notice, the fact that the note is made payable to a fictitious person, is no defense. In such case, the defendant would be estopped, as against the plaintiff, from setting up the fact. It was the defendant who made the note. By making it payable, as he did, he affirmed the existence of such a person as the payee therein named; and he should not, against a person ignorant of that fact—one who may reasonably be presumed to have acted upon the faith of the fact thus represented—be allowed to assert the contrary. This principle of estoppel *in pais* has a very extended and just application in the law of bills and notes, the doctrines of which are designed to give credit and circulation to negotiable paper, and to that end throw its protection around the honest and fair holders thereof. In respect to such a holder, the maker is bound to know that the payee is a real person, or thereafter hold his peace."

In the case of *Phillips v. Im Thurn*, 114 Eng. C. L. 694, the defense was that the payee was a fictitious person, in ignorance of which fact the drawer drew the bill. It was decided by the court that since the drawer would be estopped to set up the fact that the payee was a fictitious name, the like estoppel would apply to an acceptor for the honor of the bill. In *Forbes v. Esby*, 21 Ohio St. 474, the defendants drew upon their correspondents in New York city in favor of Cochran, Holmes & Co., and by them indorsed to Charles Clark (a fictitious name assumed by one William Mara), and in that name indorsed in blank. Forbes & King became the *bona fide* holders of the draft. It was presented, payment refused by previous directions of the defendants, protested, and due notice given to the defendants. Mr. Justice McIlvaine, speaking for the court, says that the defendants were estopped from denying plaintiffs' title. In Chalmers' late Digest of the Laws of Bills of Exchange, p. 144, the law is thus stated: "B., at the request of X., makes a note payable to C.'s order. C. is a fictitious person, but B. does not know this. X. indorses the

note in C.'s name, and it is negotiated to D., a *bona fide* holder for value, without notice. D. can sue B. *Cooper v. Mayer* (1830), 10 B. & C. 468; *Beeman v. Duck* (1843), 11 M. & W. 251; *Schultz v. Astley* (1836), 2 Bing. (N. C.) 544."

Passing from these cases, and the authorities therein cited, to the reasons for these two drafts being held as payable to fictitious payees, we add, that of course if Watkins had not intended that such payees should become parties to the transaction, or, in other words, had knowledge of their non-existence, there could be no question as to error in the judgment of the court below. (1 Parsons on Bills, 32, 560, 591, 592, and notes; 2 Parsons on Bills, 40, 50; Story on Bills, §§ 56, 200; 4 E. D. Smith, 83). Ought the defendant, who made the bills in ignorance of the fact that the persons named as payees are fictitious, and thus parted with them to a correspondent, be permitted to aver and prove this as against the innocent holders for value? Either plaintiffs or defendant must lose in this transaction. Watkins transmitted these drafts to his correspondent McLain, and McLain was thereby enabled to fraudulently put them in circulation. If the payees had been known to defendant as fictitious, they could have been treated by McLain as well as the plaintiffs, as bills payable to bearer. Now when a drawer issues a bill to a fictitious payee, although ignorant of that fact at the time, and parts with the possession thereof, ought he in fairness and justice to be allowed to say that such bill is void? "Where one of two innocent parties must suffer from the wrongful or tortious acts of a third party, the law casts the burden or loss upon him by whose act, omission or negligence such third party was enabled to commit the wrong which occasions the loss." (*Bank v. Rld. Co.*, 20 Kas. 520). While the finding is, that the defendant was not negligent in making and sending these drafts, and that McLain was not the agent of the defendant in these transactions, it fully appears from the other findings that the drafts were sent to McLain, and that only for the act and conduct of the defendant, induced by the wrongful acts of McLain, these bills would not have been issued and sent forth as commercial paper. To some extent, it must be conceded, defendant, by his conduct as to these bills, placed himself in the hands of his correspondent. For instance, if Greer and Cobb had been in existence, and McLain had passed over to them these drafts without taking back any note or mortgage, it will not be questioned that after Greer and Cobb had indorsed and negotiated them to innocent holders, the defendant could not set up the fraud of these parties as any

defense. In this way, if such parties were insolvent, the defendant would have been also absolutely defrauded of his money. So we think that, having relied upon the application received from McLain for the names of the payees in the drafts issued by him, and two of the payees being fictitious, and then having transmitted these drafts to McLain, and thus given him the opportunity to put them in circulation, the defendant is not now in a condition to claim that the drafts are void, and to set up as a defense that he did not know such payees to be fictitious. He acted upon the information derived from McLain; he is bound by McLain's knowledge, and must be conclusively presumed, as against the innocent holders for value, to have known that these two drafts are payable to fictitious payees. He can no more set up the fraud of McLain as to these two drafts, than he can the fraud of Greer and Cobb, had there been such persons actually existing in Kingman county, and they had obtained these drafts from McLain without complying with the request of the drawer as to the execution of the notes and mortgages, and then indorsed and negotiated them to innocent holders.

Counsel for defendant refer to cases making the indorsement by McLain upon the bills at the time he delivered them to plaintiffs a forgery. Even if this be so, we do not think it prevents the recovery by plaintiffs, because the principle of estoppel *in pais* is to be applied to the defendant, and as between the plaintiffs and the defendant these drafts are to be treated as if drawn payable to bearer.

The case will be remanded, with directions for the court below to render judgment upon the findings of fact for plaintiffs upon the drafts payable to Greer and Cobb, and judgment for the defendant upon the draft payable to Becker.

All the justices concurring.

Phillips v. Im Thurn (1865), 18 C. B. (N. S.) 694, 114 E. C. L. 692.

This was an action against the acceptor for honour of a bill of exchange.

To the 6th plea,—that, when the bill of exchange in the first count mentioned was made, there was no such person as Carlos Raffo, the supposed payee named in the said bill, but the said name of Carlos Raffo was and is merely fictitious, whereof the defendant

at the time of his acceptance of the said bill had no notice or knowledge,—the plaintiffs demurred; the ground of demurrer stated in the margin being, “that the defendant is by his said acceptance estopped from saying that there was no such person as Carlos Raffo, the person named in the said bill.” Joinder.

ERLE, C. J.—I am of opinion that our judgment in this case should be for the plaintiff. The action is brought by the holder of a bill accepted by the defendant *suprà* protest for the honour of the drawer, acceptance having been refused by the drawee. At the maturity of the bill all things were done which were necessary to fix the defendant with liability as an acceptor for honour: and the defence relied on, is, that the bill was drawn payable to a fictitious payee, of which fact the defendant had no notice at the time of his acceptance of the bill. I take it to be clear, that, if the defendant had not intervened, and the action had been brought by the holder of the bill against the drawer, the drawer would have been by law compelled to admit that the bill was a valid bill payable to bearer, or, in other words, that he would have been estopped from denying the endorsement of the payee. It seems to me that there is good reason for saying that that which the drawer would be estopped from denying the acceptor for honour should also be estopped from denying. I think he is equally bound to admit that the bill is a valid bill. The acceptor *suprà* protest paying the bill has all the rights against the drawer that an ordinary holder would have. I find no authority which contravenes this view; and it seems to me that it receives confirmation from the passages cited from Story on Bills.

Judgment for the plaintiff.

Grey v. Cooper (1782), 3 Doug. (K. B.) 65.

This was an action on a bill of exchange, by the indorsee against the drawer. The declaration stated, that the defendant drew the bill payable to one Walker, who indorsed it to Holbrook, who indorsed it to Shipden, who indorsed it to the plaintiff. Pleas: 1. *Non assumpsit*; 2. That Walker, at the time of the indorsement by him, was an infant. Demurrer to the second plea.

LORD MANSFIELD. The ground on which the drawer is charged is, that he drew a bill by which he engaged to pay according to the order of the payee, whoever that payee might be. He

might give the infant an authority which the law itself does not give him. In the same manner he may give a bill to his own wife. The drawer says, "let anybody trust the payee on my credit." The acts of an infant are void, or not, accordingly as they are for his benefit. The privilege of an infant is personal, and there is no question here as between the infant and another person. The infant sets up no claim, and the drawer is liable to pay.

Judgment for the plaintiff.

CONTRACT OF THE GENERAL INDORSER.

§ 68—2.

True v. Bullard (1895), 45 Neb. 409.

Error from the district court of Hitchcock county. Tried below before WELTY, J.

J. W. Cole and Wm. O. Woolman, for plaintiff in error.
L. H. Blackledge, contra.

RAGAN, C. The material facts in this case are: On the 9th of December, 1889, one R. W. Boston made his certain promissory note of that date for \$265, due September 9, 1890. This note was payable to the order of and delivered to one S. L. True. Before the maturity of this note True sold and delivered it to W. C. Bullard & Co., and indorsed it in blank. Before the note matured Bullard & Co. sold it to a bank, and it not being paid at maturity, the bank sued the maker of the note and True as an indorser and obtained a judgment against them. True then brought this suit in the district court of Hitchcock county against Bullard & Co., reciting the foregoing facts, and alleging that at the time he sold the note to Bullard & Co. and indorsed it, it was orally agreed between him and Bullard & Co. that the sale and indorsement of the note to them should be and was without recourse on him, True; or, in other words, notwithstanding that he indorsed the note in blank, he was not to be or become liable thereon as an indorser. True in his petition did not aver that he had paid the judgment rendered on the note or any part thereof. The district court sustained objections to the evidence offered by True to support the allegations of his petition on the ground that the petition did not state facts sufficient to constitute a cause for action, and directed a verdict for Bullard & Co., on which judgment of dis-

missal of True's action was rendered, and he prosecutes to this court a petition in error.

The record presents two questions: May the payee of a promissory note, who has indorsed his name on the back thereof and delivered said note to a purchaser, show by parol, in a suit between himself and said purchaser, that by so indorsing and delivering said note, that the liability created thereby was a different liability from that which the law implies against a party by reason of such an indorsement of commercial paper? Or, applied to the facts in the case at bar, is it competent for True to prove by parol that at the time he indorsed and delivered the note in question to Bullard & Co. that the agreement between them was that he, True, should not be liable on said note as an indorser by reason of such indorsement and delivery? When the payee of a note indorses his name thereon in blank and delivers said note to a purchaser thereof, the law in effect writes over the signature of said indorser an agreement on his part that if the holder of said note shall present it to the payor thereof at its maturity for payment and it be dishonored, and that if such holder shall then give such indorser notice in a reasonable time of the dishonor of said note, that he, the indorser, will pay it; and on the part of the indorsee of said note, the contract created by the law is that he will present said note at its maturity to the payor thereof for payment, and if it be dishonored, that he will within a reasonable time notify the indorser of said note of such dishonor. It must be admitted that many eminent authorities hold that parol evidence is not admissible to contradict or vary the contract which the law raises by reason of the indorsement in blank and delivery of commercial paper, either on the part of the holder or the indorser; but in *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326, this court held that between the original parties a blank indorsement might be modified by parol; that the entire transaction might be shown by reason of which the indorsement was made, and that parol evidence was admissible for the purpose of proving the actual contract made between the indorser and indorsee at the time of the blank indorsement. On the authority of that case we hold that it was competent for True to show by parol that at the time he indorsed and delivered the note to Bullard & Co. that, notwithstanding such indorsement and delivery, he, True, was not to be held liable as an indorser of the note; and that Bullard & Co. in effect purchased the note without recourse on True. But we must not be understood as deciding that the payee of a promissory note, who indorses it in blank and delivers it before

maturity, could set up the defense that he in fact sold and indorsed without recourse, as against a subsequent indorsee of said note who purchased it before maturity, in the usual course of business, and without knowledge of the contract between the indorser and first indorsee.

As already stated, True in his petition did not aver that he had paid any part of the judgment which had been rendered against him on said note in favor of the bank to whom it had been sold and assigned by Bullard & Co. So far, then, as the petition shows, True has not been damaged. Under no view of the case can he have any cause of action against Bullard & Co. until he shall have paid the judgment rendered on said note or some part thereof. (*Churchill v. Moore*, 15 Kan., 255; *Lott v. Mitchell*, 32 Cal., 24; *Jeffers v. Johnson*, 21 N. J. Law, 73).

But what was the contract between True and Bullard & Co.? The petition avers that Bullard & Co. "expressly agreed, and it was understood and made a part of the consideration of the sale and transfer of said note, that said defendants Bullard & Co. were to accept and take said note without any liability or recourse whatever on the part of this plaintiff on account of the non-payment of said note at maturity." The most that can be said for this language is that by it Bullard & Co. agreed that so far as they were concerned as holders of the note they would not look to True for payment thereof; that he was not to be liable to them as an indorser. But Bullard & Co. did not agree, so far as the pleadings show, not to sell and indorse this note, nor did they agree that if they did sell and indorse the note they would advise the purchaser of the contract existing between them and True. The mere fact that Bullard & Co. transferred this note before maturity to the bank, and that as against the bank True could not set up as a defense the contract under which he indorsed it to Bullard & Co., does not invest True with a right of action against Bullard & Co. In other words, Bullard & Co. have not violated their contract with True. The petition does not state a cause of action. The judgment of the district court is right and

is

Affirmed.

Mt. Mansfield Hotel Co. v. Bailey (1891), 64 Vt. 151, 16 L. R. A. 295.

Special assumpsit for the annual interest due on five promissory notes endorsed by the defendant. Plea, the general issue. Trial by court at the April term, 1890, Lamoille county, Munson, J., presiding. Judgment for the defendant. The plaintiff excepts. The case appears in the opinion.

P. K. Gleed, for the plaintiff.

Geo. Wilkins, for the defendant.

The opinion of the court was delivered by

TYLER, J. It appears by the statement of facts that Geo. Doolittle and Mrs. E. J. Doolittle promised to pay the defendant, William P. Bailey, or order, five thousand dollars, as their five promissory notes should respectively become due, and the interest thereon annually. The notes are dated April 1, 1886, are for \$1,000 each, and payable 16, 17, 18, 19 and 20 years from their date.

The plaintiff, as the indorsee of the notes, seeks to recover of the defendant, as indorser, the first three years' interest upon them without demand of the makers and notice to the defendant of the makers' default of payment. The defendant's counsel contends, 1st, that the indorser cannot in any event be compelled to pay the interest as it annually falls due, that his conditional liability does not become absolute until the notes respectively mature, and then only after demand and notice; 2d, that if the interest is collectable of the indorser as it annually accrues it is after the usual measures have been taken to make him chargeable.

The general rule of law relative to the respective liabilities of the maker and indorser of a promissory note is well defined. The promise of the maker is absolute to pay the note upon presentment at its maturity. The promise of the indorser is conditional that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due notice given him of the dishonor, pay the same to the indorsee or other holder.

It seems clear that the indorser is not liable for the annual payment of the interest without performance of the conditions by the holder. If he were thus liable his relation to the note would be like that of a surety or a joint maker, and his promise, instead of being conditional, would be absolute as to the payment of the interest. This is contrary to the general statement of the law that

his liability is conditional. The relation of principal does not exist between him and the maker. They are not co-principals. Their contracts are separate and they must be sued separately, at common law. (Randolph Com. Paper, s. 739). The maker has received the money of the indorser and in consideration thereof promises to repay it according to the terms of the note, and if he fails to pay, his contract is broken and he is liable for the breach. The contract of the indorser is a new one, made upon a new consideration moving from the indorsee to himself. His undertaking is in the nature of a guaranty that the maker will pay the principal and interest according to the terms of the note. His liability is fixed upon the maker's default upon demand, and notice to him of such default. This new contract cannot be construed as an absolute one to pay the interest without default of or demand upon the maker. The promise cannot be absolute as to the payment of interest when it is clearly conditional as to the payment of the principal.

It is held that though the annual interest upon a promissory note may be collected of the maker as it falls due, it is not separated from the principal so that the recovery of it is barred by the statute of limitations until the recovery of the principal is thus barred. (*Grafton Bank v. Doe et al.*, 19 Vt. 463). The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand interest, and he has the election to do so, or wait and collect it with the principal, for it is regarded as an incident of the principal. (*National Bank of North America v. Kirby*, 108 Mass. 497). But it is so far an independent debt that he may maintain an action against the makers for it as it annually accrues, or allow it to accumulate and remain as a part of the debt until the note matures. (*Catlin v. Lyman*, 16 Vt. 44). In the latter course the makers would be chargeable with interest upon each year's interest from the time it was due until final payment. (1 Aik. 410; *Austin v. Imus*, 23 Vt. 286). It was said by the court in *Talliaferro's Ex'rs. v. King's Admr.*, 9 Dana 331, (35 Am. Dec. 140): "The interest, by the terms of the covenant, is made payable at the end of each year, and is as much then demandable as if a specific sum equal to the amount of interest had been promised; and, in default of payment, as much entitles the plaintiff to demand interest upon the amount so due and unpaid. The fact that the amount so promised to be paid is described as interest accruing upon a larger sum, which is made payable at a future day, cannot the less entitle the plaintiff to demand interest upon

the amount, in default of payment, as a just remuneration in damages for the detention or non-payment."

It is true that at the maturity of the notes the defendant would be liable, as indorser, for both principal and interest, upon due demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year. Notice of the maker's default of payment of interest need not be given annually to the indorser in order to charge him with liability for interest when the note matures. This is so stated by the court in *National Bank of North America v. Kirby*, *supra*. In *Howe v. Bradley*, 19 Me. 31, it is held that when a note is made payable at some future period, with interest annually till its maturity and no demand is made for the annual interest as it becomes due, or if made, no notice thereof is given, the indorser, if duly notified of the demand and non-payment when the note falls due, is liable for the whole amount due, both principal and interest; that the obligation imposed by the law upon the holder is only to demand payment and gives the required notice when the bill or note becomes payable. It is not held in this country that interest is subject to protest and notice, according to the law merchant, in order to charge indorsers with it when the note matures. The usual consequence of omission to notify the indorser of the maker's default, namely, the release of the indorser, would not follow the omission to give him annual notice of such default. A note is not dishonored by a failure of the maker to pay interest. *First National Bank v. County Commissioners*, 14 Minn. 77, (100 Am. Dec. 196, note).

The defendant's counsel argues that it would be inconsistent to hold the indorser liable for interest, which is a mere increment of the principal, until his liability is established to pay the sum out of which the interest springs; that there may be defences to the note at its maturity which will release the maker and consequently the indorser, or that the indorser may then be released by neglect of demand and notice. On first impression it might seem inconsistent that the *maker* should be compelled to pay interest before his liability has been fixed to pay the principal, but that is his contract. It is also argued that the fact that the interest, when uncollected, is an incident of the debt so that as it annually falls due, demand and notice are not necessary in order to charge either the maker or the indorser with liability to pay it when the note matures, is ground for holding that the indorser is not liable for interest until he is made liable for the principal.

The question is whether the indorser, by the act of indorse-

ment, promises to pay anything on the note till its maturity, at which time he clearly may be liable for both principal and interest. The note bears upon its face an absolute promise by the *maker* to pay the principal when it becomes due and the interest thereon annually. His promise is two-fold. It is as absolute to pay the interest at the end of each year as to pay the principal at the end of the time specified. Now what is the nature of the contract which the *indorser* makes with the indorsee? His contract is not in writing, like that of the maker, but his name upon the note is evidence that he has received value for it, and also of an undertaking on his part that it shall be paid according to its tenor. When he indorses it and delivers it to the indorsee he directs the payment to be made to the latter, and in effect represents that the maker has promised to pay certain sums of money according to the terms of the note, that is, the principal at maturity and the interest annually; that if the maker fails to pay on demand, he, the indorser, will pay on due notice. His conditional promise is concurrent with the absolute promise of the maker. His liability to pay interest and principal, as each respectively falls due, arises from his contract. It is his contract that he will make payment whenever the maker is in default and he, the indorser, is duly notified thereof.

It is true that interest is an incident, an increment of the principal, and that the holder may wait for it until his note matures and then collect it with the principal. He may, however, by the contract, collect it as it falls due, of the maker, and upon the latter's default, of the indorser.

The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Hen. 8, c. 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of *DeHavilland v. Bowerbank*, 1 Campb. 50, interest has been allowed in England upon express contracts therefor, and not otherwise. Where there is such a contract interest stands like the principal in respect to the rights and liabilities of an indorser. (Sedg. on Dam., 383; *Selleck v. French*, 1 Conn. 32, [6 Am. Dec. 189, note]). In *Jennings v. Napanee Brush Co.*, reported in Ca. Law Jour., Vol. 20, No. 19, in a learned opinion by McDougall, J., it was held that where there was an express contract to pay interest annually or semi-annually, it was not different from a contract to pay an installment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the

indorser with it. In that case the indorser was released from payment of the first two half-yearly instalments of interest for want of demand and notice.

While we adhere to the doctrine laid down in *Grafton Bank v. Doe, et al., supra*, that interest is in general an incident of the debt, it is consistent to hold that where the indorser is himself a party to the original contract to pay interest annually, as in the case at bar, by his indorsement he guarantees the performance of that contract. Any other holding would make the indorser liable for only a part of the maker's contract.

The case of *Codman v. The Vt. and Ca. Railroad Co., 16 Blatch. 165*, has been brought to our attention. The trustees and managers of the Vermont Central Railroad Co. and the Vt. and Ca. Railroad Co., issued notes to the amount of \$1,000,000 in sums of \$1,000 each, payable to the defendant company, in twenty years from their date, with interest semi-annually on presentation of the interest coupons made payable to bearer and attached to the notes. On each note was this indorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The coupons were not indorsed. The notes were put on the market and the plaintiff purchased fifty of them, and subsequently, after due demand, notice and protest, brought this suit to recover the amount of two coupons on each of his notes, the notes themselves not having matured. Without passing upon the question whether the guaranty was negotiable and available to the plaintiff, as a remote holder, Wheeler, J., among other questions that arose in the case, decided that the indorsement was a contract of indorsement running to the bearer, and that demand, notice and protest fixed the liability of the indorser to pay the coupons, and gave judgment for plaintiff for the amount of the coupons.

The Supreme Court of the United States has repeatedly held that the statute of limitations begins to run upon interest coupons payable annually or semi-annually, from the time they respectively mature, although they remain attached to the bonds, which represent the principal debt. (*Amy v. Dubuque*, 98 U. S. 470). Where the indorser is the payee of the note there would seem to be no difference in his liability in respect to interest whether the maker's promise to pay it is contained in the body of the note or in interest coupons not indorsed, the notes to which they are attached

being indorsed, and the coupons being mentioned in the notes; but it is unnecessary to decide that question here.

Upon the facts found by the County Court this action cannot be maintained for the reason that the plaintiff never fixed the defendant's liability to pay the three years' accrued interest. It does not even appear that the makers refused payment of it or that they were requested to pay it before this suit was brought; therefore nothing is due from the defendant to the plaintiff.

Judgment affirmed.

Ross, Ch.J., dissents.

Ross, Ch.J. I concur in the disposal made of this case; and in most of the grounds and reasoning of the opinion. But I do not see my way clear to concur in holding, that an indorser upon a promissory note, payable on time, with the interest annually, can be made chargeable for the payment of the interest, before he can be, and is, charged with the payment of the principal. By placing his name on the back of the note as an indorser, without making any limitation upon his indorsement, he guarantees its payment, upon condition that the indorsee, when the time named in the note for its payment arrives, shall present it to the maker and demand its payment, and, if the maker fails to make payment, shall seasonably notify him of such failure. When this is done, the indorser promises to pay whatever of principal and interest, is then due upon the note. This condition attaches primarily to the principal of the note. I think it attaches to the interest only as it becomes a part of the principal. It seems to me to be illogical, and pressing the indorser's conditional undertaking beyond its proper scope and office, to hold that he can have his liability fixed to pay for the use, or legal rental of the principal, before his liability to pay the principal is fixed. Interest is legal damage, fixed usually by statute, for the detention and use of money. As soon as the money is due and payable, the law implies damage for its detention and use. It may also arise from the contract, for the detention and use of the principal before it is payable by the terms of the contract. When stipulated to be paid annually, it may be collected from the maker of the note at the end of each year, because such is his contract. It is an incident, and outgrowth from the principal. The promise to pay it, whether implied or expressed, is a dependent promise. It is attached to and arises from the promise to pay the principal. When the interest is stipulated to be paid annually, and before the principle is payable, the maker

when sued for the annual interest, because his promise to pay it is dependent upon his promise to pay the interest, may set up any defence to the suit for recovering the annual interest, which he could if the suit were for the recovery of the principal such as fraud in the inception of the note; or want, or failure of consideration, or duress, or that his liability for the principal is conditional, the terms of which have not been complied with. If he defeats the action, it will estop the holder from recovering the principal when due, and *vice versa*. In 1 Herman on Estoppel and Res Judicata 231, it is said, "So in an action for interest due on a bond, a judgment for the plaintiff for the amount of interest claimed will be conclusive evidence in an action on the bond, and estop the defendant from alleging fraud, for the reason that it was a defence which was available in the former suit, and the presumption is that it was so used." Citing *French v. Howard*, 14 Ind. 455; *Van Dolsen v. Abendroth*, 43 N. Y. Super. Ct. 470; *Preble v. Supervisors*, 8 Bis. 358, and *Edgell v. Sigerson*, 26 Mo. 583; *Cleveland v. Creviston*, 93 Ind. 31, (47 Am. R. 367.)

The opinion recognizes this intimate, attached and dependent relation of the promise to pay the interest annually to the promise to pay the principal, from which the interest springs. It recognizes that the statute of limitations does not begin to run on such promise to pay interest annually until the principal falls due, in accordance with *Grafton Bank v. Doe, et al.*, 19 Vt. 463. This must be because, until severed by enforced collection or payment, interest is but an incident, and dependent of the principal. It also recognizes this relation in holding that the indorsee may allow the interest to accumulate, and may fix the indorser's liability to pay it, by a proper demand, default and notice in regard to the principal when that falls due. That is because liability for the principal carries its dependencies. I concur in these holdings. They are supported by the decisions cited in the opinion. But they rest, and, in my judgment, can rest only on the basis that the promise to pay the interest annually, both for its consideration and enforcement is dependent upon the promise to pay the principal. The opinion also holds that the liability incurred by the indorsement is conditional, that that condition attaches to the entire note, and that the liability of the indorser must be fixed by demand, default and notice, in regard to the interest payable from the maker yearly, as well as in regard to the principal. It then seems to conclude, that, because the indorsee can lawfully demand and collect of the maker, whose promise to pay the principal is absolute, upon his dependent, but yet absolute promise to

pay the interest annually, he can by proper demand, default and notice, collect such annual interest of the indorser whose promise and liability to pay the principal is conditional, and cannot as yet be made absolute, and whose promise to pay the annual interest, it has already held is dependent upon his promise to pay the principal, and therefore, in my judgment, takes the condition attached to his liability to pay the principal. It is at this point that I fail to follow the reasoning of my associates. Here they assume,—as I think—and proceed upon the basis, that, the indorser's implied promise to pay the annual interest, is not dependent, but independent, as it would be, if it were an instalment of the principal. The holdings in the opinion, that the indorser's liability for the accrued annual interest may be made absolute by a proper demand, default and notice in regard to the principal when it falls due, and that it may also be made absolute by a proper demand, default and notice yearly, result in holding that the maker's promise to pay the interest annually which he indorses, is both dependent upon, and independent of, his promise to pay the principal. I do not think that it has this double and inconsistent character, but only the former. If it be independent, must not demand and default be made, and notice given yearly, or the indorser become discharged? And if demand and default be made, and notice given annually, must not the statute of limitation begin to run from date of such demand? I think so. The result of giving this double character to the promise to pay interest annually will lead, I think, to some difficult legal problems. If the note is to mature at the end of twenty years, and the payee holds it and allows the interest to accumulate for ten years, and then having indorsed it, sells it, the indorsee must wait for the accumulated interest until the note falls due, because the maker's promise and the indorser's liability in regard to that interest is dependent upon the indorser's liability for the maker's promise to pay the principal, which is still conditional, and for that reason the indorser's liability to pay the accumulated interest is conditional, and will remain so until it is made absolute for the principal; but when the eleventh year's annual interest falls due, the indorsee may at once, by due demand, default and notice, fix the indorser's liability to pay that year's interest, and may enforce its payment by suit, while the indorser's liability for the payment of the principal from which the year's interest springs, cannot for years be made absolute and may never be. After the indorser's liability for the payment of the year's interest has thus become fixed by suit, on what legal principles governing *res judicata*, could the indorser

defend, in a suit brought, without further demand, default and notice, at the maturity of the note, for the enforcement of the payment of the principal and the ten years accumulated interest?

The only decision relied upon for the holding of my associates is from 6 Blatchford. I do not regard that in point. The guarantee was written instead of implied. The relation of the indorser to the obligation was exceptional, it having been given by its receivers and managers. The interest was expressed in separate coupons, which, for some purposes, are treated as independent obligations. The statute of limitations runs on them generally from their maturity. (*Amy v. Dubuque*, 98 U. S. 470, [25 L. C. P. Co. 228]). In this respect they are unlike the promise in the note to pay the interest annually, as held in *Grafton Bank v. Doe et al.*, 19 Vt. 463. I do not think that the indorsee has the election to fix the indorser's liability for, and recover of him annually such yearly interest, or to wait and fix it by proper demand, default and notice in regard to the principal. I think his liability can only become absolute for the payment of the incident or outgrowth of the debt, when it becomes absolute for the payment of the principal from which that incident or outgrowth springs. The opinion on this branch of the case is made to rest upon the ground that the indorser's undertaking, on due demand and notice, is to make good to the indorsee any failure of the maker to perform the contract, and, in that the maker has promised to pay the interest at the end of each year, the indorser has likewise so undertaken upon proper demand and notice. But his implied contract being conditional in regard to the payment of the principal, I think is conditional also to any incident or outgrowth of the principal, so long as it is conditional in regard to the payment of the principal, and that he only becomes absolutely bound to pay the interest at the end of each year, when he becomes bound absolutely to pay the principal. When so bound for the payment of the principal, then this obligation to pay the interest at the end of each year attaches, in respect both to the interest then accrued, and the interest which may thereafter accrue. I would modify the opinion in the particular indicated.

WARRANTIES OF GENERAL INDORSER.

§ 68.

Ferguson v. Staples (1889), 82 Me. 159, 17 Am. St. Rep. 470.

This was an action by the plaintiff, as surviving partner of the firm, Samuel Otis & Co., to recover the consideration paid by said firm to the defendant for three overdue town orders, which were afterwards adjudged by this court to be void. The orders were indorsed by the defendant.

W. H. Folger, for plaintiff.

N. H. Hubbard, for defendant.

HASKELL, J. The defendant, upon payment of \$3,000 to the municipal officers of the town of Stockton, received from them three town orders for \$1,000 each, dated November 17, 1877, payable to his own order, with interest annually, and already accepted by the treasurer of the town.

On the 17th of January, 1879, the defendant indorsed one year's interest upon each of the orders and indorsed and delivered the orders to the plaintiff for value, and in good faith, both parties believing them to be legal obligations of the town.

The orders have been held by this court as issued without authority from the town, and, therefore, of no binding validity upon it. The plaintiff sues in assumpsit to recover the consideration that he paid the defendant for the orders, as money had and received, and interest.

Town orders, although not commercial paper to the extent that transfer to an innocent holder shuts out equitable defenses, may be negotiable in form, and become transferable under the same rules of law that would be applicable to commercial paper. (*Parsons v. Monmouth*, 70 Maine, 262).

The indorsement of a note is a new contract. The indorser engages that the note shall be paid according to its tenor; that is upon proper presentment, demand and notice; he engages that it is genuine and the legal obligation that it purports to be, and that he has title to it, and a right to indorse it. (Sto. Pr. Notes, § 135; Dan. Neg. Inst. § 669; *Bank v. Fearing*, 16 Pick. 533; *Bank v. Caverly*, 7 Gray, 217).

All engagements of the indorser, except payment, conditioned upon demand and notice, and possibly the validity of the note when it is voidable only, are absolute warranties and not dependent upon any condition whatever. If the note transferred by

indorsement be a forgery, or absolutely void for any other reason, the indorser may be sued for the original consideration paid him, or he may be held as a party without demand and notice. (Dan. Neg. Ins. §§ 669, 675, 1113; Par. N. & B. 444; *Copp v. McDougall*, 9 Mass. 1; *Burrill v. Smith*, 7 Pick. 291).

The indorsement and transfer by the payee, of a dishonored promissory note, for value, must create all the engagements on the part of the indorser that an indorsement of the note before maturity would create, except as to demand and notice. To charge the indorser of a dishonored note, demand and notice are required within a reasonable time after the indorsement. The indorsement in such case is like the indorsement of the demand note of the maker of that date, or the drawing of a bill upon the maker of the note payable to the transferee. (*Greely v. Hunt*, 21 Maine, 455; *Hunt v. Wadleigh*, 26 Maine, 271; *Sanborn v. Southard*, 25 Maine, 409; *Goodwin v. Davenport*, 47 Maine, 112; 2 Par. N. & B. 13).

The plaintiff has elected to sue for the consideration that he paid the defendant for the worthless orders. The plaintiff has already recovered from the town by an action for money had and received, brought in the defendant's name, the part of the money defendant loaned upon the order that went to the use of the town. This sum the plaintiff must deduct from the amount that he paid the defendant for the orders and have judgment for the balance and interest.

Defendant defaulted. Damages to be assessed at nisi prius.

PETERS, C.J., WALTON, VIRGIN, EMERY and FOSTER, JJ., concurred.

State Bank v. Fearing (1835), 16 Pick. 533, 28 Am. Dec. 265.

Assumpsit on a promissory note for the sum of \$2,000, dated April 15, 1833, payable to the order of Thomas Jackson, junior, in six months, made by Charles Brown, and indorsed with the names of the payee, and of the defendant.

By an agreed statement of facts, it appeared that the signatures of Brown and the defendant were genuine, but that the defendant could prove, if such evidence was admissible, that the indorsement of the name of the payee was a forgery; that the note was presented by Brown to the plaintiffs for discount, in the usual course of business, and discounted by them for him; that

at the time of such discount, the plaintiffs and the defendant were ignorant of the forgery; and that due notice of the non-payment of the note was given to Brown, Jackson and the defendant.

If upon this statement of facts the court should be of opinion, that the plaintiffs were entitled to judgment, the defendant was to be defaulted, otherwise, the plaintiffs were to be nonsuited.

Austin, for the plaintiffs.

Parsons and *Stearns*, for the defendant.

SHAW, C.J., delivered the opinion of the court.

The peculiar features of this action are, that the plaintiffs claim of the second indorser, from whom they immediately took the note. The question is, whether the forgery of the indorsement of the name of a prior party, is a good defence to the note; and the Court are of opinion that it is not.

In general it is not necessary for the holder to prove the signature of any party prior to the party whom he sues. The reason seems to be obvious, that the party defendant, by his indorsement, has admitted the ability and the signature of all prior parties. (*Bayley on Bills*, 313; *Critchlow v. Parry*, 2 Campb. 182.) The effect of the engagement of the indorser is, that if the prior parties do not pay the note according to its tenor upon due presentment, upon notice to him, he will. It is therefore a rule upon this subject, that a plaintiff is under no obligation to prove the signature of those prior to the party intended to be charged. It is very different where he claims against the acceptor of a bill or maker of a note. They respectively promise to pay to the payee or his order, and until he has made such order by his indorsement, the plaintiff can establish no title, and to prove such order, he must prove the genuineness of his signature. (*Smith v. Chester*, 1 T. R. 654; *Lambert v. Pack*, 1 Salk. 127.) So an acceptor is bound, though the bill be forged. (*Jengs v. Fowler*, 2 Strange, 946).

The circumstance that this bill was offered for discount, by Brown, makes no difference; the plaintiffs had a right to look to their immediate indorser, and if satisfied to take the note on his credit, he is liable to them; and it was for him to see that he has a good remedy over against those who purport to be prior parties.

Defendant defaulted.

CONTRACT OF THE IRREGULAR OR ANOMALOUS INDORSER. § 66.

Gums v. Giegling. (See page 209.)

SECTION VIII.—PRESENTMENT AND DEMAND.

PRESENTMENT TO PRINCIPAL DEBTOR NOT NECESSARY. § 72.

Harrisburg Trust Co. v. Shufeldt (1897), 78 Fed. 292.*Strudwick & Peters*, for plaintiff.*Hastings & Steadman*, for defendant.

HANFORD, District Judge. This is an action to recover a balance due after deducting partial payments upon a negotiable promissory note, made payable on demand. The defendant has demurred to the complaint, his contention being that the same is insufficient, for failure to allege a demand prior to the commencement of the action. There is a rule of long standing, and supported by the weight of authority in this country, that the commencement of an action is itself a demand, and that failure to request payment, prior to the commencement of the action, affords no ground of defense. (*Bank v. Fox*, Fed. Cas. No. 2,683; 5 Am. & Eng. Enc. Law, 5282⁴⁶. It is insisted, however, that the courts and the text-books in this country have fallen into error by following early decisions, which were controlled by peculiar facts, and which are insufficient of themselves to establish a general rule upon the subject. It is unwise to depart from business customs and practices which have been sanctioned by repeated decisions of courts, and acquiesced in for a considerable time, and which may fairly be supposed to have been contemplated by the parties at the time of making their contract. This contract must be construed as one having been made the subject to the rule above stated, and the maker of the note is, by the terms of his contract, liable without any demand, prior to the commencement of an action.

Demurrer overruled.

Hills v. Place (1872), 48 N. Y. 520.

Appeal from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment entered in favor of the plaintiff on a verdict.

The action was brought to recover the amount of a promissory note, made by the defendant, payable one month after date, at the Hanover National Bank of the city of New York, to the order of D. Russel, and by him indorsed to the plaintiff.

The judge, on the trial, after the testimony was closed, directed the jury to find a verdict for the plaintiff for the amount of the note and interest, to which direction an exception was taken by the defendant.

The facts material to the decision of the case in this court are sufficiently stated in the opinion.

H. C. Place, for the appellant.

J. R. Hills, for the respondent, in person.

LORT, Ch.C. The evidence given on the trial, most favorably construed to the defendant, does not prove payment, or establish facts sufficient to bar a recovery for damages and costs, as well as the principal of the note.

It shows that the note was presented for payment on behalf of the plaintiff at the Hanover National Bank, where it was made payable, about 11 o'clock of the day it fell due, and that it was not then paid; that the defendant, on being notified of the fact by the cashier, immediately thereafter, between eleven and twelve o'clock, "put funds in the bank and gave instructions to have it paid on presentation."

It was not presented for payment to or at the bank or to the plaintiff, at any time or place after the funds were so left, before the commencement of this action.

The cashier of the said bank, on being asked, "what is the custom of banks in the city of New York in reference to presenting notes?" answered, "that the custom is to present a note for payment between ten and three o'clock, but a man has until three o'clock to pay his note, and it cannot be protested until after three o'clock." He also stated that ordinarily notes are presented between ten and three o'clock, and if a note is not paid on the first presentation thereof, that it is necessary to present it again or the second time, according to custom, and that "the notary never goes until three o'clock."

It is clearly established, by the preceding statement, that the note in question was never in fact paid to the plaintiff, but it is shown, on the contrary, that the funds which were left at the bank, to be applied to its payment on presentation, were shortly thereafter actually withdrawn by the defendant himself.

There is no ground for the theory or claim of the defendant's counsel, that "the parties agreed in the note to make the Hanover Bank the mutual receiving agent, and a payment to that agent on the third day of grace of the \$230 to pay the note, and an acceptance of that by the agent, was a payment of the note,

and the maker had then discharged his obligation, and the holder had only to go to the common agent, the bank, and receive the money."

The bank was in no sense the plaintiff's agent for the collection of the note, or the receipt of the amount due thereon, or otherwise.

It was named, in the connection in which it was used, merely as the *place* where its business was transacted, for the purpose of making payment of the note *there*, without conferring or intending to confer any power, authority or duty on the association itself in reference thereto.

Such designation did not make it incumbent, as a precedent condition, to create a liability or obligation by the maker of the note to pay it or to give a right of a recovery thereon, that it should be presented at that particular place for payment. The effect or consequence of an omission or failure to make such presentment was not to exonerate the maker from his promise to pay what he had agreed, but only to relieve him from damages in case he was ready at the time and place appointed to pay it, and there was no one there to receive the money. Such readiness is considered equivalent to a tender of the sum payable, and an answer pleading that fact, and a payment of the money due into court, would be a bar to a recovery of interest and costs, but not to the cause of action.

This principle is settled by the decisions in *Wolcott v. Van Santvoord* (17 John., 248) and *Caldwell v. Cassidy* (8 Cow., 271).

The custom referred to by the cashier does not interfere with that principle. It evidently does not affect the maker's liability. It only shows that the usual banking hours are allowed him to make his payment, and that his note cannot be protested till they have passed.

Assuming that the leaving of the money in the bank, after the demand made by the plaintiff, was sufficient proof of his readiness to pay the note, and is to be considered as a tender of payment in due time, yet he has entirely failed to show that he ever brought the money into court; and as a protest is never necessary to charge or hold the maker, it follows, from the views above expressed, that the plaintiff was entitled to recover the amount of the note, with interest; and, there being no disputed questions of fact, the court was authorized to give a direction to the jury to find a verdict in favor of the plaintiff, for both principal and interest.

It is, therefore, unnecessary to consider the sufficiency of the exception to that direction, so far as it related to the right to recover interest, or what was the effect of the presentment of the note and the refusal to pay it before the deposit of the funds to meet it. The judgment appealed from must be affirmed with costs.

All concur.

Judgment affirmed.

TIME OF PRESENTMENT.

§ 74.

Farnsworth v. Allen (1855), 4 *Gray* (Mass.), 453.

Action of contract against the indorser of the following promissory note:

"BOSTON, May 23, 1853.

"Three months after date I promise to pay to the order of Walter M. Allen one hundred and fifty dollars, value received.

"FRANCIS FREEMAN."

At the trial in the court of common pleas, a witness testified that he received the note, at the close of bank hours on the last day of grace, from the Grocers' Bank in Boston, who had received the note for collection from the Cambridge Market Bank, but did not know the residence of the maker or indorser; that he inquired of a director of the Cambridge Market Bank, and learned that the maker lived at Winchester and the indorser at North Cambridge; and the same afternoon carried the note to a notary public in Charlestown, and told him where the parties resided.

The notary public testified that, as soon as he could after receiving the note for protest, he went to the house of the maker, (about ten miles from Boston,) and arrived there about nine o'clock in the evening; that there was no light in the house, and the inmates appeared to have retired for the night; that he rung the bell, and after some time the maker came to the door with a light; and he presented the note, stated its contents, and demanded payment, which the maker refused, saying that he could not, or should not, or would not pay it; that he returned with the note to Charlestown, and on the same evening put in the post office a proper notice of dishonor, addressed to the defendant at North Cambridge.

The defendant contended that the demand proved was not sufficient to charge the indorser. But Hoar, J., ruled otherwise,

the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. G. Abbott, for the defendant.

C. R. Train, for the plaintiff.

BIGELOW, J. The note declared on, not being payable at a bank, or at any place where business was transacted during certain stated hours in each day, was properly presented to the maker at his place of residence. It was also the duty of the holder to present it within reasonable hours on the day of its maturity. No fixed rule can be established, by which to determine the hour beyond which a presentment, in such case, will be unreasonable and insufficient to charge an indorser. Generally, however, it should be made at such hour that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. In the present case, taking into consideration the distance of the place of residence of the maker from Boston, where the note was dated, and where it was held when it became due; the means that were taken to ascertain the residence of the maker, and the season of the year at which the note fell due, we are of opinion that a presentment at nine o'clock in the evening was seasonable and sufficient. It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it seasonable or otherwise. (*Barclay v. Bailey*, 2 Campb. 527; *Triggs v. Newnham*, 10 Moore, 249, and 1 Car. & P. 631; *Wilkins v. Jadis*, 2 B. & Ad. 188; *Cayuga County Bank v. Hunt*, 2 Hill, N. Y. 635).

Exceptions overruled.

WHERE AND TO WHOM PRESENTMENT SHOULD BE MADE. §§ 74, 75.

Nelson v. Grondahl (1904), (N. D.) 100 N. W. 1093.

Appeal from District Court, Cass county; Charles A. Pollock, Judge.

Action by Peter Nelson against Olaf Grondahl. Judgment for defendant, and plaintiff appeals. Reversed.

H. R. Turner, for appellant.

Benton, Lovell & Holt, for respondent.

MORGAN, J. This action is brought against the defendant as indorser of a promissory note of which he was the payee. The plaintiff, in his complaint, alleges that one Steffes made and delivered such promissory note to the defendant, and that the defendant duly indorsed and transferred it to the plaintiff for value, and that the note was duly presented for payment when due, and payment refused. The defense attempted to be proven at the trial was that the note was not presented for payment in the manner provided by law. At the close of the taking of the testimony the district court directed a verdict for the plaintiff for the sum of \$339.84, the amount claimed to be due in the complaint, and denied defendant's motion to direct a verdict. The defendant thereafter made a motion for judgment notwithstanding the verdict, on grounds stated, or for a new trial on account of errors occurring at the trial and the insufficiency of the evidence to sustain the verdict. The motion for judgment notwithstanding the verdict was granted by the court, and the appeal is from the judgment entered on such verdict. A statement of the case was settled, specifying the errors relied on.

The only specification of error made on this appeal is that the court erred in granting the motion for judgment notwithstanding the verdict. The question raised by such specification is that there is no evidence showing that the note was presented for payment when it became due, as is required by the statute, before an indorser can be held liable under his indorsement. Section 70, c. 100, Rev. Codes 1899. The certificate of the notary who protested the note for non-payment is in evidence, and recites that "I, * * * did present the note hereto attached, * * * and demanded payment thereof, which was refused." The certificate is silent as to the place of presentment and as to the person to whom presentment was made. The note was, by its express terms, made payable to Grondahl, the defendant, "at his store in Fargo, North Dakota." The respondent contends that the certificate of the notary is of itself insufficient to show a proper presentment of the note for payment to the maker, and that the evidence, outside of the certificate, is not competent to prove that the note was presented for payment as required by the terms of the statute. Section 73 of the Negotiable Instruments Law of 1899 (Civ. Code, p. 1048) provides that "presentment for payment is made at the proper place where a place of payment is specified in the note and it is there presented." Section 72 of the same law provides that presentment for payment is sufficient when made at the proper place to the person primarily liable on the

instrument, or, if he is absent or inaccessible, to any person found at the place where presentment is made. The trial court granted the motion for judgment notwithstanding the verdict on the ground that the notary's certificate did not show presentment of the note for payment at the place where the note was, by its terms, made payable, and that the notary's evidence of that fact was not competent to prove such presentment, he having stated that he had no independent recollection of the fact of such presentment. If the fact of presentment for payment, as required by the statute, is supported by any competent evidence that reasonably tends to show due presentment, the granting of the motion for judgment was erroneous. The notary was called as a witness, and testified that he recollected that the note was by him presented for payment; that he had no independent recollection of the fact, but that he so testified from an inspection of his certificate stating the fact. He further testified that in cases where notes specified the place where payment was to be made he presented them at that place, and that he did so in every instance. Whether this evidence, in addition to the certificate, is competent, and sufficient to show presentment for payment at the proper place in accordance with the statute, is the only question arising on the appeal.

It is first claimed that there is no evidence that the note was presented to the person primarily liable on the note; that is, the maker. The certificate does not state the name of the person to whom it was presented, and the notary does not give the name of the person in his testimony. A presentment at the bank where a note is payable is a sufficient presentment to the maker, although the name of the person to whom presented is not given. It is held to have been made to some person connected with the bank. This is expressly held in *Ashe v. Beasley*, 6 N. D. 191, 69 N. W. 188. If the notary's evidence is receivable, it brings the evidence in this record within the rule stated in *Ashe v. Beasley*, *supra*, and is sufficient to show presentment at the store where the note was made payable, and to a person connected with such store. See *Douglas v. Bank of Commerce* (Tenn.), 36 S. W. 874; 1 Daniel, Neg. Inst. (5th Ed.), §.635. In such cases no personal demand on the maker is necessary. He is primarily liable on his promise to pay. Section 70, Neg. Inst. Law 1899 (Civ. Code, p. 1048). A presentment is necessary in order to fix the liability of the indorser, which is a conditional obligation to pay the note if not paid at maturity by the maker. If a maker stipulates to pay at maturity at a specified place, and the note is there presented for payment at its maturity, and payment refused or not made, the

liability of the indorser is fixed after notice to him, although there was no personal demand made on the maker. (*Pearson v. Bank of the Metropolis*, 1 Pet. 89, 7 L. Ed. 65; *State Bank v. Hurd*, 12 Mass. 172; *Whitwell v. Johnson*, 17 Mass. 449, 9 Am. Dec. 165; *Meyer v. Hibsher*, 47 N. Y. 265.) A presentment at the store was therefore sufficient to bind the indorser after notice to him of the fact. It remains to be determined whether the evidence of the notary was admissible to supply facts that occurred in reference to the presentment that were omitted from the recitals of this certificate. It is well settled that the facts stated in the certificate of protest of promissory notes may be supplemented by other facts that transpired, and that such other facts may be shown by the oral testimony of the notary or by other testimony. (*Ashe v. Beasley*, *supra*; *Seneca County Bank v. Neass*, 5 Denio, 334; Daniel, Neg. Inst. [5th Ed.], § 969, and cases cited.) On this question the respondent does not contend that the defects of notary's certificate may not be supplied, but he earnestly contends that there is no evidence of presentment at the proper place, because the notary testifies that he has no independent recollection of such fact aside from the certificate. Respondent contends that the notary's evidence that he presented notes for payment in every instance at the place where payable is inadmissible merely as a statement of his custom unaccompanied by some recollection of the fact. We agree that on authority and principle the evidence should be held admissible in cases like the one under consideration. The evidence objected to in this case is not merely the statement of the notary's custom only. He had his certificate of protest before him, from which he was able to say that a presentment was made by him of the note described. The fact of a presentment was established by the certificate in a general way, but not definitely. Whether the presentment was made at a right place was not stated nor established thereby. The certificate showed some kind of a presentment, but one not necessarily legal or proper under the statute. The bare allegation that the note was presented for payment is not equivalent to certifying that the note was presented at the place where it should have been done. The certificate of the notary is evidence only of facts stated therein, and it will not be enlarged by indulging in presumptions. The facts must be stated, and, if stated, the certificate is *prima facie* evidence that the facts properly a part of such certificate are true. (*People's Bank v. Brooke*, 31 Md. 7, 1 Am. Rep. 11; *Duckert v. Von Lileinthal*, 11 Wis. 56; *Magoun v. Walker*, 49 Me. 419; *Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.) The wit-

ness' invariable practice was proper evidence to sustain and to supplement the statements of the certificate that presentment had been made. In *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65, it is said: "We think it not uncommon in practice to corroborate the defective memory of a witness by proof of what was his habit in similar circumstances. Thus a subscribing witness to a will or bond, if unable to recollect whether he saw the testator or obligor sign the instrument, or heard it acknowledged, is often permitted to testify to his own habit never to sign as a witness without seeing the party sign whose signature he attests, or hearing that signature acknowledged. And it seems to be persuasive and legitimate 'supporting' evidence." See, also, *Flack v. Green*, 3 Gill & J. 474; *Miller v. Hackley*, 5 Johns. 375, 4 Am. Dec. 372; Gillette on Indirect & Collateral Ev. § 68; *Martin v. Smith* [Mich.], 66 N. W. 61; *Seneca County Bank v. Neass*, *supra*; *Lindenberger v. Beall*, 6 Wheat. 104, 5 L. Ed. 216; *State v. Rawls*, 2 Nott. & McC. 331. The testimony was therefore competent to support or corroborate the notary's evidence that he recollected presenting the note for payment, and, together with the certificate, was sufficient to take the case to the jury on the question of due presentment of the note to the maker for payment.

The defendant included in his motion for judgment notwithstanding the verdict an alternative motion for a new trial, and gave notice of intention to move for a new trial, and therein specified the grounds thereof. Having prevailed in the court below on his motion for judgment notwithstanding the verdict, the motion for a new trial was not perfected. Leave to do so after filing the remittitur in the clerk of the district court's office is granted. (*Kreatz v. St. Cloud School District* [Minn.], 81 N. W. 533.) If such motion is not made, judgment is directed to be entered on the directed verdict for the plaintiff.

The judgment is reversed, and the cause remanded for further proceedings.

All concur.

Wallace v. Crilley, imp. (1879), 46 Wis. 577.

Appeal from the County Court of Milwaukee County.

The case is stated in the opinion. The defendant, Crilley, appealed from a judgment in favor of the plaintiff.

Brief for the appellant by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson*.

Brief for the respondent by *G. C. Markham* and *E. P. Smith*, and oral argument by *Mr. Smith*.

TAYLOR, J. This action is brought upon a promissory note, given by the defendant Sears, and indorsed by the defendant and appellant Crilley. Neither of the defendants appeared or put in any answer or demurrer in the court below, and judgment for the amount of the note and costs of suit was rendered against both defendants. Crilley appealed from the judgment, and assigns as error, that the complaint does not state facts sufficient to constitute a cause of action against him.

The point made is, that the complaint does not show that the note was presented to the maker thereof for payment, and payment thereof demanded, at the maturity of said note. The following are the allegations of the complaint upon that subject: "And the plaintiff further says that, when said note became due and payable, the same was presented at the office of the maker of said note, the defendant William G. Sears, in the Chamber of Commerce building in the city of Milwaukee, Wisconsin, for payment, and that payment was then and there duly demanded upon said note, and payment thereof was then and there refused." The complaint contains a proper allegation of protest for non-payment, and notice of such non-payment given to the said defendant Crilley.

The appellant insists that a presentation and demand of payment at the place of business of the maker is not sufficient; that the demand must be made personally of the maker, and, if not so made, the excuse for not making such presentment must be set out in the complaint.

We think the learned counsel for the appellant misapprehends the rule. Story, in his work on Bills of Exchange, says: "When it is said that the 'bill must be presented for acceptance, at the place of the domicil of the drawee,' we are to understand by this expression, the town, city, village, or other municipality, within which he has his residence. But in many cases the holder will have an election as to the place of presentment. Thus, for example, if the drawee has his home or domestic establishment in one town, and his place of business is in another town, a presentment made at either place will be good. So, if the drawee has his dwelling house or home in one part of the same town, and his place of business in another part, a presentment may be made at either, at the option of the holder." (Sec. 236, and notes).

The same rule applies to the presentation of promissory notes, when such presentation and demand of payment are necessary to charge an indorser. See *Shed v. Brett and Trustees*, 1 Pick., 413;

Williams v. Bank of the United States, 2 Peters, 96; *Ogden v. Cowley*, 2 Johns. R., 274.

In the case at bar, the complaint alleges that the note in question was presented at the office of the maker, Sears, in the city of Milwaukee; and, there being no answer, it must be taken as true that the maker had an office or place of business in the city of Milwaukee, and that the presentation of the note for payment at such office was a proper presentation.

The learned counsel also insists that the complaint is defective in not stating that the note was presented to the maker, and a demand of payment made of him, or of some other person who was authorized by such maker to receive and answer such presentment and demand. We think this objection is answered by the allegation in the complaint, "that payment was then and there duly demanded upon said note, and that payment was then and there refused." It having been shown that the office was the proper place to present and demand payment of the note, the above allegation that payment was then and there duly demanded and refused, is equivalent to an allegation that the same was presented within the usual business hours, and, if it be necessary to show that it was presented to the maker, or to some one authorized to answer for him (which we very much doubt), that it was so presented.

This court held in the case of *Bank v. Countryman*, 11 Wis. 399, that, in an action against an indorser of a promissory note, it was sufficient if the complaint alleged in general words, "that payment of the note was duly demanded at maturity," without any further statement as to the time or place of demand, or of the person of whom such payment was demanded. In that case the court say: "This manner of stating the demand of payment, and notice of the demand and non-payment to the indorser, has been held to be sufficient in New York since the adoption of the code, and we have no doubt that those decisions are in conformity to the spirit of that enactment. We are disposed to follow these decisions upon this point, and to hold that such a general statement of the performance of the conditions precedent to a party's right to recover against the indorser is sufficient." The rule laid down in this case has been followed and approved in *Smith v. Railway Co.*, 19 Wis., 326-331; *Cutler v. Ainsworth*, 21 Wis., 381; *Town of Pine Valley v. Town of Unity*, 40 Wis., 682. In the last case, which was an action brought to recover for the support of a pauper, in which it was necessary, in order to entitle the plaintiff to recover, to prove that a written notice had been given by the supervisors of the complaining town, to one or more of the super-

visors of the defendant town, before suit brought, stating therein certain matters as prescribed by law, it was held that an averment in the complaint that the plaintiff duly notified the defendant, was a sufficient averment of legal notice in all respects. These cases clearly show that the objections taken by the learned counsel for the appellant in this case cannot be supported, and that the complaint states a good cause of action against the appellant.

The cases above cited are not in conflict with the decision in *Duckert v. Von Lileinthal*, 11 Wis., 57, cited by the learned counsel for the appellant, and relied upon by him to sustain his objections to the complaint in the case at bar. In that case there was no evidence given on the trial of any demand of payment of the maker of the note, except what was contained in the certificate of the notary. The court held that such certificate was not evidence of the contents of the notice served, and the judgment was reversed on that ground. What was said further in the case by the late learned Justice Paine, was not necessary to the determination of the case. The statement made by Justice Paine, that "the certificate should show presentment to the maker, or its legal equivalent, and should not be left to intendment or presumption," was clearly not intended by him to apply to the allegations necessary in a complaint. He was speaking of the proof necessary to be given on the trial, to prove the truth of the allegation that presentment had been duly made and payment duly demanded. That he intended to limit this statement to the proof to be made, and not to the allegations necessary to be embodied in the complaint, is clear from the fact that he assented to the decision made in *Frankfort Bank v. Countryman*, *supra*, decided at the same term.

By the Court—*The judgment of the county court is affirmed.*

King v. Crowell (1873), 61 Me. 244.

On facts agreed.

Assumpsit against the defendant as indorser of the following promissory note, his signature admitted to be genuine.

"\$150.00.

"April 8, 1871.

"Four months after date I promise to pay to the order of A. J. Crowell one hundred and fifty dollars. Value received.

"H. E. MORTON."

Endorsed, "A. J. Crowell, Jeremiah Glidden, C. H. Glidden."

Writ dated Feb. 17, 1872. Plea, general issue.

This note was negotiated to the plaintiff for a full consideration a short time after its date.

The maker and the indorsers resided in Winthrop village, and the plaintiff in Monmouth. H. E. Morton, at the time of the making of the note in question, was a manufacturer of boots and shoes, and a dealer in boots, shoes, hats, and caps, and had a store and place of business in said Winthrop village. On the third day of July, 1871, the maker failed in business. His real estate and goods were attached on that day, and his place of business closed, the attaching officer taking possession of the keys and the goods. On Friday, the morning of August 11, 1871, the plaintiff went to Winthrop for the purpose of collecting this note, or of taking the necessary steps to hold the indorsers. He went to the store recently occupied by the maker of the note, and finding it closed he went directly to Morton's house, with the note in his possession, for the purpose of making a demand of payment. Morton was not at the house, but the plaintiff was informed he was on the street, where the plaintiff found him about ten o'clock, A. M., and then and there requested payment of the note of said Morton, which was refused. About two hours afterwards, on the same day, the plaintiff sought the defendant, told him he had demanded payment of the note of Morton, that he refused to pay it, and informed him (defendant) that he should look to him, as indorser, for the payment of the note. The defendant replied that he would look into the matter, and, if he found that he was holden, would see the note paid in two or three weeks. In two or three weeks the plaintiff called on the defendant again for payment, when the defendant refused to pay, saying that he had inquired carefully into his liability as indorser of this note, and was advised that he was not liable, and should not pay the same.

It was agreed that upon the above facts the full court should enter such judgment as the law required.

If the action could be maintained, defendant to be defaulted; otherwise, plaintiff to become nonsuit.

E. Kempton, for the plaintiff.

J. H. Potter, for the defendant.

VIRGIN, J. When the defendant indorsed and put into circulation the note in suit, he thereby ordered the maker to pay the amount therein specified to the plaintiff; and he also thereby promised that if the note were duly demanded of the maker and not paid, then he himself would, upon receiving due notice of the demand and non-payment, pay it to the plaintiff.

And now, in this suit upon his promise, the defendant declines to pay the note on the following alleged grounds:

1. That the demand was not lawful inasmuch as it was made on the street.

The general rule of law is that the holder must use diligence to find the maker and demand payment of him; and the inquiry will be, whether, under the circumstances of the case, due diligence has been used. (3 Kent's Com. 129).

It is familiar law that when a promissory note payable generally, and not at a specified place, is seasonably demanded at the maker's known and settled place of business for the transaction of his moneyed concerns, it is sufficient to hold the indorser. And the same may be said of a like demand made at his place of residence. Neither does it make any difference whether the maker be personally present or temporarily absent at the time of the demand. In either case, the law has for many years been constant in declaring that the evidence afforded by such a demand constitutes full proof of due diligence on the part of the holder.

But in the case at bar the plaintiff went still further than the technical exactions of the law required. He was a resident of Monmouth. On the day the note became due he went to Winthrop village, where both the maker and the defendant resided, "for the purpose of collecting this note, or of taking the necessary steps to hold the indorser." On going to the store which had been occupied by the maker as his place of business, he found it had been closed and in the possession of an officer more than thirty days; that the maker had failed in his business, and that all his property was under attachment. Thereupon the plaintiff went to the maker's place of residence, where he was informed that the maker was not at the house, but had gone out on the street. Had he gone through the ceremony of demanding payment of the note at the house, while the maker was out on the street, the law would pronounce the plaintiff's diligence ample. But not finding the maker at home the plaintiff trebled his diligence, sought and found him on the street in that country village, and then and there requested payment of the note of the maker personally, which was refused.

It does not appear (as it would be likely to, if true) that any objection to the place of demand was made by maker. If he had had funds with which to pay, not with him, but at his house, he would at once have said so. If he had objected to the place and requested the plaintiff to accompany him to his house and receive the money due on the note, and the plaintiff had declined so reas-

enable a request, the legal aspect of this branch of the case might thereby have been materially changed. But no such facts exist. He simply refused payment, and, in all human probability, for the real, though to him, perhaps, unpleasant, reason that all his property was in the custody of the law, and he had in fact nothing wherewith he could pay.

It would seem that such a demand would be more satisfactory to all concerned than a mere formal ceremony of a demand gone through at his place of residence during the maker's absence. And we have no hesitation in declaring the demand sufficient under the circumstances, so far as the place is concerned, to charge the defendant.

We are aware that Byles on Bills, 196, declares that a demand made on the street is not sufficient. Such is the doctrine expressed, too, in the author's notes in Leading Cases on Bills, 327, 328. And there are several cases containing the *dictum* in general terms that a demand must be made either at the maker's place of business or place of residence. But our attention has been called to no case, neither have we, after considerable research, been able to find any wherein the court having the question before it decided adversely to a demand made on the street, under circumstances similar to those in this case.

On the other hand, Judge Story, in discussing the law applicable to notes like this, uses the following language: "The general rule is, that the presentment for payment may be made to the maker personally, or at his dwelling house or other place of abode, or at his counting house or place of business. It seems a presentment may always be made personally to the maker, wherever he may be found, although he may not be either at his domicil, or at his place of business." And he cites quite a large number of cases, in a note, as authority. (Story on Prom. Notes, § 235).

In Edwards on Bills (2 ed.), 150, is found the following: "Being made payable at large, it is due at any and every place; but for the purpose of charging the indorser, it must be presented for payment to the maker personally, or at his residence or place of business. If it be made payable at a particular place in the city, it is necessary to present the note there for payment, for the purpose of charging the indorser. But even in this case, if a personal demand is made upon the maker, and no objection is made by him as to the place, it is sufficient."

So in 3 Kent's Com. 128. "Demand of payment must be made by the holder or his agent upon the acceptor at the place appointed for payment, or at his house or residence, or regular

known place of his moneyed business, or upon him personally, it no particular place be appointed." And again, on page 96, "If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand."

And Prof. Parsons says: "In general a personal demand would be sufficient, if made at any place where the maker may reasonably be expected to be in condition to pay; and if made in any other place—such, for instance, as in the street—it would usually be good, unless objection were made to payment because the place was an improper one, or some similar reason were given for the refusal. (1 Parsons on Notes and Bills, 421). And he uses somewhat similar language on p. 372.

The doctrine as stated above by Judge Story is approved in *Taylor v. Snyder*, 3 Denio, 145, Sup. Ct. N. Y., published as a leading case in *Leading Cases on Bills*, 313, 316.

Finally, our own court held, that where a note signed by two, made payable at their dwelling houses, was demanded of them, together, at the barnyard of one of them, and no objection was made as to the place of the demand, the demand was sufficient. (*Baldwin v. Farnsworth*, 10 Maine, 414).

2. But the defendant further objecting to the sufficiency of the demand says: "As the payer has a right to require its delivery up to him before he pays, and may insist that the holder produce it, the note should have been exhibited."

It is true that the rule requiring the person making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and, although applicable to all written contracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay cannot apply to cases in which he not only does not offer, but absolutely refuses, to pay, and does not even express any desire to see the note.

The idle ceremony of producing the note when the maker unqualifiedly refuses to pay is well illustrated by C. J. Shaw, in *Gilbert v. Dennis*, 3 Met. 497, where he says: "Even under the law of tender, which is extremely strict, it is held that where a party to whom a tender is to be made declares that he will not accept it, an actual production and offer of the money is not necessary."

The case finds expressly that the maker had the note in his

possession when he made the demand. We think the objection cannot prevail. (*Arnold v. Dresser*, 8 Allen, 435; *Freeman v. Boynton*, 7 Mass. 485; *Etheridge v. Ladd*, 44 Barb. 69).

3. The defendant finally contends that the notice having been given to the defendant on the last day of grace was premature, for the reason that the maker had the whole day in which to pay.

We presume, however, that the defendant predicated this objection upon the alleged insufficiency of the demand. For long before, and certainly ever since, the review of the cases by C. J. Shaw in *Staples v. Franklin Bank*, 1 Met. 43, the rule applicable to notes like the one in question has been that the note is due on actual demand at any such hour on the last day of grace that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in condition to attend to ordinary business; and if upon such demand payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no such demand be made, and the maker does nothing amounting to a waiver, he has the whole of the day in which to make payment, and is not in default until the expiration of the business day within which such demand might have been made. (*Greeley v. Thurston*, 4 Greenl. 479; *Flint v. Rogers*, 15 Maine, 67; *Lunt v. Adams*, 17 Maine, 230; *Farnsworth v. Allen*, 4 Gray, 453; *Estes v. Tower*, 102 Mass. 65; *Gordon v. Parmelee*, 15 Gray, 413; *Manchester Bank v. Fellows*, 28 N. H. 303; *Crosby v. Grant*, 36 N. H. 418).

Defendant defaulted.

APPLETON, C. J.; CUTTING, DICKERSON, DANFORTH, and PETERS, JJ., concurred.

PRESENTMENT WHERE PERSON PRIMARILY LIABLE IS DEAD. § 78.

Gower v. Moore (1845), 25 Me. 16.

The suit was against Moore, as indorser of a note given by Robert Witherspoon to him, and indorsed by the defendant, dated August 12, 1841, and payable on August 15, 1843.

Witherspoon, the maker of the note, died in February, 1842; administration was taken out on his estate, and it was rendered insolvent; one Freeman, then the holder of the note, proved it before the commissioners as a claim against the estate, and notified the defendant, after the death of Witherspoon and before

the note became payable, that the maker of the note being dead, he should look to the defendant for payment; and that the defendant, about a month after the day of payment, was notified by the then holder of the note, that it was unpaid, and that he should look to the defendant for payment.

This was the plaintiff's case; and thereupon Goodenow, the district judge presiding, directed a nonsuit. To this the plaintiff filed exceptions.

J. C. Woodman, for the plaintiff.

Dunn, for the defendant.

The opinion of the court was by

SHEPLEY, J. This is a suit by the indorsee against an indorser of a promissory note, made on August 12, 1841, and payable in two years. Before it became payable the maker had deceased, an administrator had been appointed, the estate had been represented to be insolvent, commissioners of insolvency had been appointed and the holder of the note had proved it before them. When the maker of a note dies, before it becomes payable, the holder should make inquiry for his personal representative, if there be one, and present the note on its maturity to him for payment. The case of *Hale v. Burr*, 12 Mass. R. 86, may be considered as presenting an exception to this rule; but doubts have been expressed, whether it could be considered as either correct in principle, or founded upon sufficient authority.

In this case the indorser may be considered as knowing, that the note would not be paid on presentment; and that the estate was insolvent. But such knowledge does not relieve the holder from his obligation to make presentment and give due notice of its dishonor. The promise of the indorser is a conditional one to pay, if the note be duly presented to the maker and seasonable notice be given to him of its dishonor.

The holder cannot assume the right to decide, that his performance of the condition will be of no service to the indorser, and thus put that matter in issue to relieve himself from the performance of the condition imposed upon him by law. (*Nicholson v. Gouthit*, 2 H. Bl. 609; *Clegg v. Cotton*, 2 B. & P. 239; *Prideaux v. Collier*, 2 Starkie's R. 57).

The various relations, which the parties, whose names are upon negotiable paper, sustain towards other persons, whose names are not upon it, cannot be anticipated.

The real debtors, who may feel obliged to pay, may not wish to exhibit themselves as such. A deceased party may possibly

have held a contract of some responsible person to pay in case the note should be duly presented for payment. So may an indorser. To hold an indorser liable and yet deprive him of the benefit of such a contract could not be justified. It is best for a commercial community that the rules be simple, subject to few exceptions, and not liable to be varied to meet the apparent injustice of particular cases. The notices given to the defendant in this case were either too early or too late to be of any avail.

Exceptions overruled.

PRESENTMENT TO PARTNERS.

§ 79.

Fourth Nat. Bank v. Heuschen et al. (1873), 52 Mo. 207.

Appeal from St. Louis Circuit Court.

Hitchcock, Lubke and Player, for appellants.

Finkelnburg and Rassieur, for respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note, by the plaintiffs, as holders for value before maturity, against the makers and indorsers.

The note was made by a partnership composed of the defendants, Frederick W. Heuschen, Frederick Krite and Frederick Perschbacker, whose firm name was "Heuschen, Krite & Co." It was executed to the defendant, John H. Schaaless, who indorsed the same to Wilhelm Ricke, and Ricke to the defendant, Frederick W. Heuschen, and he to the plaintiff.

At the close of the evidence the plaintiff asked the following instructions, which were refused by the court and exceptions duly saved:

"1. The court declares the law to be that service of notice of protest by a notary, through the hands of a clerk, is sufficient to charge the indorsers, and the notarial certificate verified by affidavit is evidence of such service."

"2. If the court, sitting as a jury, believe from the evidence that at the maturity of the note it was placed in the hands of a notary public who during business hours of that day presented the same for payment at a place of business bearing the sign of Heuschen, Krite & Co., a place where said firm had been doing business for several years and which a person in charge thereof then and there represented as the place of business of Heuschen,

Krite & Co., to which place plaintiff had been directed by one of the partners as their place of business about ten days previously, and which the same partner designated to the notary as their place of business on the day of maturity, and that furthermore said notary presented said note for payment to F. W. Heuschen, a member of said firm, in person on the same day, then there was sufficient demand to charge the indorsers although the court may believe that a dissolution of said firm had in fact taken place previous to the maturity of said note."

The court then at the instance of the defendants and against the objections of the plaintiff gave the following declaration:

"If the makers of the note sued on in this cause had a place of business in the city of St. Louis, but the individuals, or either of them, composing the firm of Heuschen, Krite & Co., resided in the said city of St. Louis, it was the duty of the notary to demand payment of said note of the makers thereof or either of said makers or at their place of residence or the place of business of any one of them."

The case had been submitted for trial to the court sitting as a jury, and when the court refused the plaintiff's instructions and allowed those of defendants, the plaintiff took a nonsuit and by leave moved to set it aside, which motion being overruled he appealed to general terms when the judgment at special term was reversed and the cause remanded, and the defendants have appealed to this court.

On the trial at special term the plaintiff gave evidence tending to prove the facts as set forth in the second instruction, but failed to give any evidence in regard to the notice by the notary's clerk, and it will be unnecessary to pass upon the plaintiff's first instruction. The bill of exceptions shows that there were two similar cases tried by the court at the same time and the first instruction may have had reference to the other case.

The indorsers of a negotiable note are only liable in case due diligence has been used to make a demand of payment from the makers and due notice given to them in case the note is dishonored.

Where the facts are agreed on, due diligence in making a demand is a question of law; but when the facts are not agreed on, the question of due diligence becomes a mixed question of law and fact. That is, the jury are to find the facts and the court is to pronounce the law upon the facts as they may be found by the jury. The usual way is to state in the instruction hypothetically the facts to be found from the evidence by the

jury, and to pronounce upon those facts so to be found, the conclusion of law resulting therefrom. This mode was pursued in the second instruction asked by the plaintiff. The evidence strongly tended to prove the facts as hypothetically put in that instruction. Those facts, if found to be true, in my judgment, as a matter of law, constituted due diligence in making a demand of payment on the makers of the note so as to fix their responsibility so far as such demand was necessary. A personal demand of payment on one of the parties was sufficient, although such demand may have been made after the dissolution of the firm; or a demand made in good faith at the late place of business of such firm, made on information, whether true or false, received from a member of the firm that such place was the proper place to make the demand, would constitute due diligence. A partnership, although dissolved, must be treated as still in existence so far as the question of demand, protest and notice is concerned, and the acts of one partner in such case must be considered as binding on all the others. Therefore the facts indicated in plaintiff's second instruction constituted not simply due, but extraordinary diligence in making demand of payment of the makers of the note.

The instructions given at the instance of the defendants did not cover the whole case as made by the plaintiff. The plaintiff had the right to have his case as made by the evidence presented by a proper instruction.

The judgment at General Term will therefore be affirmed.

The other judges concur.

PRESENTMENT TO JOINT DEBTORS.

§ 80.

Arnold v. Dresser (1864), 8 Allen (Mass.) 435.

Contract against the indorser of a joint promissory note.

At the trial in the superior court, before Morton, J., it appeared that on the day when the note became due, Theodore S. Stratton, in behalf of the plaintiff, demanded payment thereof of the two promisors, but did not have the note in his possession at the time; and the note was not paid. The plaintiff testified that on the same day he called upon the defendant, and gave notice to him that demand had been made on the makers; that

one of the makers called during the interview, and both he and the defendant said that the note should be paid soon.

Upon this evidence, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendant, which was accordingly rendered, and the plaintiff alleged exceptions.

H. W. Bishop, for the plaintiff.

J. E. Field, for the defendant.

BIGELOW, C. J. The defendant is not liable as indorser of the note declared on. In order to charge him it was necessary for the plaintiff to show due presentment and demand of the note on both the promisors; *Union Bank of Weymouth, &c. v. Willis*, 8 Met. 504; or a waiver thereof by the defendant. There were no such presentment and demand. If a note is made payable at a particular place, the holder must have it at that place on the day of its maturity, in order to make due presentment; if it is not payable at a designated place, the note must be presented to the promisor at his usual place of business or at his dwelling house. But no valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence. (*Shaw v. Reed*, 12 Pick. 132; *Freeman v. Boynton*, 7 Mass. 483).

Nor was there any waiver of due demand by the defendant. No such waiver is made, where an indorser promises to pay the note in ignorance of the fact that he has been discharged by the laches of the holder, in not making due demand of the promisor, or where such promise is made under a misapprehension or mistake of facts concerning the due presentment and demand of the note. (*Low v. Howard*, 11 Cush. 268; *Kelley v. Brown*, 5 Gray, 108). In the case at bar, the defendant made the statement on which the plaintiff relies to show a waiver, not only in ignorance of the fact that the note had not been duly demanded of one of the promisors, but under a mistaken belief that it had been so demanded, induced by the false statement to that effect made to him by the plaintiff.

Exceptions overruled.

PRESENTMENT BY WHOM.

§ 74.

Sussex Bank v. Baldwin et al. (1840), 17 N. J. L.

See §§ 96, 104-107.

Armstrong and Williamson, for rule.*J. W. Miller and P. D. Vroom*, contra.

DAYTON, J. This case was tried at the Sussex Circuit of May, A. D. 1838, and verdict had for the plaintiff. Sundry reasons are now relied upon to set the same aside, and I will consider them in their order.

The defendants are the indorsers of a promissory note made by Conrad Teese, October 24, 1836, for five hundred and five dollars and sixty-one cents, payable six months after date to the order of Wm. A. Baldwin & Co., (the defendants) and by them indorsed to the plaintiff. The first reason assigned is, that the note was not duly presented to the maker, for payment. That it was presented at an *improper place*, to wit, the office of Teese, the maker, and by an *improper person*, to wit, one Dennis, who swears that he acted as the clerk and under the directions of Wm. Tuttle, who was himself merely the agent of James Hedden, the notary public.

As to the place of presentment, the objection may be disposed of very briefly. It is a point not properly arising under the evidence in the case. Dennis, the witness, swears that Teese, the maker of the note told him, Dennis, to present his notes for payment at that place, and that he had been in the habit of doing so. This estops Teese from objecting to the place of presentment; and that which is good against the drawer, is good against the indorser. (*State Bank v. Hurd*, 12 Mass. 172; *Whitwell v. Johnson*, 17 Mass. R. 449). But it is thought advisable that this point be put at rest in this state, by an expression of opinion by this court.

It appears by the evidence, that the office in question was the regular place of business of the maker; and I have no doubt where a person has an office or known and settled place of business for the transaction of his moneyed concerns—whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place, (as well as a presentment and demand at his residence) is good in law. It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some

old books or accounts merely, but his regular and known place of business for the transaction of his moneyed concerns. The counting room of a banker or merchant, may be a proper place for a demand, though the manufactory or work shop would not. Yet if the manufacturer or mechanic have an office, or known place of business for the purpose aforesaid, a good demand may be made there. (*Bank of Columbia v. Lawrence*, 1 Peters, 582; *Williams v. The Bank of U. States*, 2 Peters, 100; Byles on B. 118; *State Bank v. Hurd*, 12 Mass. 173).

Nor is there any thing in the objection that the presentment was made by an *improper person*. It appears by the evidence that Tuttle did the business of Hedden, the notary public, and it must have been with the consent and knowledge of the Bank, that he employed and directed Dennis, who was his clerk, to present the note in question to the drawers, and put him in possession of the note for that purpose. If the note had been paid on presentment, he could and would have delivered it up to the drawers, and that would have exonerated them from further liability. An authority to make a demand, may be created by parol, and the mere possession of the paper, is evidence enough of such authority. (3 Kent C., 108; *Bank of Utica v. Smith*, 18 J. R. 230; *Shed v. Brett*, 1 Pick. 401; *Morris v. Foreman*, 1 Dal. 193; *Freeman and others v. Boynton*, 7 Mass. 487).

There is an impression current in some degree, even with the bar, that a presentment of a note, must be by a notary, or at least on his behalf, and that he must *protest* it upon non-payment, before the indorser is liable. But this is not so. The record of a demand and notice &c. by a notary, entered in his book, according to our statute, of 21st February, 1829, Harr. C. 249, may serve to refresh his memory, or in case of his absence or death, it may be used as evidence of the facts contained in it; but such demand and protest by a notary, are not essential to a recovery against the indorser. It was not so by the common or commercial law, nor is it required by our statute. If a notary act in the premises, and make the protest, although sanctioned by general custom, it is not strictly an official act. (*Nichols v. Webb*, 8 Wheat. 326; 3 Kent C. 93-4; 1 Saund. on Pl. & Ev. 295).

Any person may present at its maturity, a promissory note of which he is put in possession, and if paid in the *ordinary course of business*, and taken up, the payment is good; and if not paid, the demand is good as a groundwork for notice to the indorsers, and that without any protest. The rule is otherwise as to foreign bills of exchange, which must be protested by a notary, and their

official seal is plenary evidence in all foreign courts and countries, of the dishonor of the bill, (*vide* cases above cited).

2. The next objection, is to the notice to the indorsers. The name of James Hedden, the notary public, was *printed* at the foot of the notice, not written; and this is assigned for error. There is nothing in this objection. The law prescribes no form of notice, its object is merely to apprise the party of the non-payment—to put him upon inquiry, that he may protect his rights. This is as well done by a notice with a printed, as with a written name.

The signature of the notary, would carry with it in a large majority of cases, no higher degree of certainty than the printed name, for it must in most cases be unknown to those to whom notices are sent. The notice in this case, came from a proper source, and stated the proper facts; that is enough. It is needless to cite authorities upon this point.

3. The next objection is, that the notice was not sent in *proper time*.

The Sussex Bank was the owner of the note, and had sent it indorsed to the Newark Bank for collection. The demand of payment was made on Teese, the maker, at Newark, where he resided on the 27th April, 1837, and on the same day, notice of non-payment was directed to S. D. Morford, the cashier of the Sussex Bank, at Newton. In this notice to Morford, was inclosed another directed to the defendants in this suit, with the name "James Hedden, notary public," printed thereto, and none other. It appeared that Tuttle, who forwarded the notices for the notary, did not know that the defendants resided in Newark, but supposed them to reside in Sussex. Morford swears that on the notice thus directed to the defendants, he wrote "Newark, New Jersey," and "thinks he sent it by the next mail." But upon cross examination, he said "he distinctly recollected putting the notice of protest directed to the defendants into the postoffice at Newton, but could not recollect at what time he did so. Could not tell precisely what was at that time the course of mail between Newton and Newark, but thought that it was carried each way, three times a week." And upon a re-examination, he said "he seldom received such notices, but when he did, was in the habit of sending them by the next mail: that he had no doubt he put the notice for the defendants, into the postoffice at Newton, the day after he received it, *but could not say whether it was in time for the next mail.*" And upon this branch of the case, the judge charged the jury, that if Mr. Morford, the cashier, placed the

notice in the postoffice, directed to the defendants, *on the day after he received it*, it was sufficient and legal evidence of notice to the defendants.

It is admitted that every *bona fide* indorser who may receive a notice of non-payment, has a day to notify his immediate indorser; but it is contended that this rule extends only to real holders and indorsers, not to such as are mere agents. That the Sussex Bank had no right by appointing the Newark Bank its agent, to extend the time allowed it by law for notifying the indorsers, of the non-payment of the note really held and owned by it. It would appear reasonable that the holder of a note should not for his own accommodation, thus vary the rights of an indorser: but the authorities grounded I presume upon commercial convenience, are the other way.

It has long been settled that a banker who holds a bill for a customer, is entitled to a day to give him notice, and the customer or principal is entitled to another day to give his indorser notice; *Firth v. Thursh*, 15 Eng. C. L. 244-5; *Robson v. Bennett*, 2 Taunt. 388; *Haynes v. Birks*, 3 Bos. & P. 599; *Langdale v. Trimmer*, 15 East, 291; *Bray v. Hadwen*, 5 M. & S. 68; *Scott v. Lifford*, 9 East, 347; *Daly v. Slatter*, 4 Carr. and P. 200; but in this last case, certain points were reserved, for which, see case; and the same principle is laid down in *Mead v. Engs*, 5 Cowen, 303, where it is held that one to whom a bill or note has been indorsed merely as agent to collect, (*e. g.* a bank) is considered as a holder for the purpose of giving and receiving notice of non-payment. See also, *Colt v. Noble*, 5 Mass. 167; *Tunno v. Lague*, 2 J. C. 1. It was said on the argument that no case could be found where this rule had been applied unless the notice was from one indorser notifying another; and that in the case now under consideration, the notice was not from the Sussex Bank, which was the indorser, but from the notary public of the Newark Bank, whose name was attached to it. Admitting this for the sake of argument to be so, yet the case of *Tunno v. Lague*, lays down the rule (which is founded in reason too) that if the agent undertakes to give notice to the other indorsers, as well as his principal, the notice will be good if given as early as it could have been received from the principal. If therefore this is to be considered a notice from the notary, and not from the Sussex Bank, it is good if given as early as the Sussex Bank was bound to give it. But admitting this to be so, an important question yet remains. Was the notice in time, supposing it to have come from the Sussex Bank? There is nothing wherein greater strictness is

required, than upon this point. It is laid down that notice of non-payment, *cannot be left to inference; without positive proof.* (Chitty on B. 314; *Assignees of Schiffner v. Sherwood*, 2 Eng. C. L. R. 405).

There is certainly no positive proof that the letter containing the notice of non-payment was put in the postoffice for the defendants, in time for the mail of the day next after it was received by the Sussex Bank. Morford says in substance, that he thinks he sent the letter by the next mail; but upon a further examination, he says he does not recollect the course of the mails at that time, and although he has no doubt he mailed it next day, he cannot say whether it was in time for the mail. There is therefore no positive proof of that fact, and we cannot infer it. Nor was it even submitted as a question of fact to the jury; on the contrary the charge of the court was, that the indorser had the entire day to put the notice in the postoffice, without reference to departure of the mail.

Does the law require that the notice be put in the postoffice in time for the mail of the day next after the indorser receives it, or has he the whole of that day to prepare it?

Kent in his commentaries, 3 Vol., p. 105, says, the modern doctrine is, that the notice must be given by the first direct and regular conveyance; meaning thereby "the first convenient and practicable mail that goes on the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice *may* indeed be sent on Thursday, but *must* be sent by the mail that goes on Friday." Kent says in a note, that the case of *Hawkes v. Salter*, 4 Bing. 715, is a relaxation of the strictness of that rule; and yet that case does not appear on examination, to militate against the general rule that the notice must go by the first *convenient* and practicable mail, on the day next after the third day of grace. In the case of *Hawkes v. Salter*, the notice should have been sent on Monday, but the only mail on Monday went out at half past nine in the morning, and one of the grounds taken was that the party was not bound to get up at an unseasonable hour, to send his notice. The court held that notice sent on Tuesday morning was in time. The general principle undoubtedly is, that a party is bound to exercise reasonable diligence only, not excessive. If therefore the only mail of the day, leave at an early hour in the morning—before a party in the exercise of reasonable diligence could mail his notice, he may properly send it by the next opportunity. The case of *Firth v. Thursh*, 8 B. and Cress. 387, was

decided on entirely different grounds: an attorney after receiving information of the indorser's place of residence, was allowed in that case one day to consult his principal, upon the ground that he stood in the light of a banker who holds paper for his principal. These cases of relaxing, cannot be considered as conflicting with the general rule laid down by Kent. In *Lenox v. Roberts*, 2 Wheat. 373; Chief Justice Marshall, in delivering the opinion of the court, says "a demand of payment should be made on the last day of grace, and notice of the default of the maker, be put in the postoffice early enough to be sent by the mail of the succeeding day." The same point substantially was ruled in *The U. States v. Adm'r. of Barker*, 4 Wash. C. C. R. 464; *Mead v. Engs*, 5 Cowen, 303; *Bank of Alexandria v. Swann*, 9 Peters, 45; and in *Whitwell v. Johnson*, 17 Mass., 454, it was ruled that if there be two mails on the day after the note falls due, it is good if the notice go by either of them.

The English cases, more particularly those of a late date, are to the same point. In *Smith v. Mullet*, 2 Camp. 208, the same rule was applied *between indorsers*. The fourth indorser having received notice of non-payment, on the 20th of the month, he mailed a notice to his immediate indorser, on the evening of the 21st, but so late that it was not delivered until the morning of the 22d. This was held by Lord Ellenborough to discharge not only the defendant, but the other indorsers, although they actually received notice of the dishonor during the day of the 22d; and it was said that although a party has an entire day, yet he must send his letter within post-time of that day. That if he retain it until after the mail is gone, he might just as well retain it until the next day: the consequence is, that an entire day is lost.

The opinion of Chief Justice Abbott, in *Geill v. Jeremy and Blagg*, 1 Moody and M. 225; as cited and reported in Chitty on B. 7 Am. Ed. 316; is but a reiteration of the same rule. He says it is well settled, that a party who receives notice of the dishonor of a bill, is not bound to forward notice to the prior party, till the next day, and it then suffices if he puts a letter in the post on any following day, so that it be forwarded by the *next practicable* post. See this case 22 Eng. C. L. R. 249; or M. and M., 61, not. (?) 225. See, also, *Hilton v. Fairclough*, 2 Camp. 633; *Williams v. Smith*, 2 B. and A. 500; Byles on B. 160.

It would certainly simplify this matter to lay down the rule, that a party has the next day entire to prepare and mail his notice, without reference to the time of the departure of the mail. But this would be in violation of the authorities and against the gen-

eral principle which requires the exercise of at least reasonable diligence. Many of the authorities say, the party has an entire day to give the notice; and so he has, but not an entire day to prepare it. He must give or send his notice on the next day if he can; if he neglect it, until after the departure of the mail, he does not give or send his notice the next day, but in point of fact, the day after the next, or at some other and perhaps more distant day. It is safe therefore to adhere to the rule, that the notice must be sent on the day next after the third day of grace, unless the mail of that day go out at so early an hour as to render it impracticable by the exercise of a reasonable diligence. (4 Bing. 715; 1 Mood P. 750; 5 M. and S. 68; 2 B. and A. 501). No precise hour can be named, particularly in the country, where the term "business hours," has a somewhat vague and indefinite meaning. Cases will occasionally arise, where it will become necessary for the court to direct the jury whether due diligence has been exercised, supposing certain facts to be proved. (*Aymer v. Beers*, 7 Cowen, 705; *Bank of Columbia v. Lawrence*, 1 Peters, 578).

Applying the above rule to the evidence in this case, the plaintiff ought not to recover; it certainly is not shown that the notice was *sent* the next day after it was received. It was mailed, but whether in time for the post, the witness does not pretend to say, and that is a fact which he must make out. The importance of sustaining this rule, is evident from the facts of this case. The mail between Newton and Newark, being only tri-weekly, if the letter were mailed after the post left, it was not one day only lost, but two or perhaps three. The charge of the court upon this point was clearly erroneous; and for this reason, if there were no other, the verdict must be set aside, unless there has been a waiver of notice, on the part of the defendants, as is contended.

Mr. Morford swears "that a week or two before the note of Teese came due, he received a private letter from Baldwin, one of the defendants, in which he (Baldwin) stated that Teese could not pay it, and requested to have it renewed." John Young, another witness, swears that Baldwin "handed him a note of Conrad Teese, indorsed by the defendants, and wished him to try and get the plaintiff to take it in renewal of a note they then held: he (Baldwin) stated that the note of Teese which they wished to take up, had been protested, and that he had received a notice of protest through the bank."

I was at first doubtful whether this evidence might not be considered as showing an implied waiver of demand and notice.

But upon looking into the authorities, I am satisfied that it cannot be so considered. We are to bear in mind, that the *defendants are not drawers* of a bill of exchange, *but indorsers* of a promissory note, and as against them, a clear case of waiver must be made out. Nothing short of an *unconditional promise* to pay, made with a full knowledge of the laches of the holder of the note, is sufficient. A knowledge that the maker could not pay, does not dispense with strict proof of demand and notice. In *Esdaile v. Sowerby*, 11 East, 117, Lord Ellenborough said, that a knowledge of the insolvency of the drawer, and acceptor of a bill, and that it must be dishonored when it became due, does not dispense with proof of actual notice of the dishonor. And this principle may likewise be found in many other cases, as well as in the elementary books. (2 H. Blac. 609; Doug. 496; 8 East, 245; 2 Bos. and P. 277; 6 B. and C. 373; Chitty on B., 7 Am. Ed. 246; 1 Saund. on Pl. and Ev. 292; *Thornton v. Wynn*, 12 Wheat. 183).

The admission therefore that Teese could not pay the note, does not affect the defendants' right to strict proof of notice. Nor does the offer to substitute a new note, *drawn by Teese*, and indorsed by the defendants, affect this right. It was not an *unconditional promise* to pay, made by the defendants. Nor if it were, has it been shown to have been made with a full knowledge of the laches of the holder, by which they were legally discharged from all liability. All this it is necessary to prove, before we can imply a waiver of notice. 1 Harr. 402; 1 D. and E. 712; 12 Wheat. R. 183; 5 Burrow 2670; *U. S. Bank v. Southard*, decided at the present term of the court, *ante*, 473.

An admission that notice of protest, had been received through the bank, is nothing. It does not appear *when* it was received. It has never been disputed that a notice was received; but the allegation is that it was not received in time, and it was the plaintiff's duty to show that it was received or rather that it was mailed in time, which it has failed to do.

There was another point made on the argument, upon which I shall do little more than express an opinion, referring to the opinions of my brethren, for the authorities. It was alleged that there was *usury* in discounting this note, by the Sussex Bank. It appears by the evidence of Morford, the cashier, that in making his calculation, he considered thirty days, a month, and 12 months, a year; and that pursuant to a proposition of the defendants, he deducted from the net proceeds of the note, one per cent

for a draft upon Newark, where at the defendants' request, the proceeds of the note were to be paid.

The mode of calculation adopted, might certainly have presented a serious question for the court, had it stood alone, but Morford swears that he was not aware that the bank received by that mode of calculation, more than six per cent, that he intended to take no more. If this be so, the taking of more than legal interest was a mistake; as much so as if it had been a mistake in adding or subtracting figures. This is the view taken by Savage, C. J., in the case cited from 3 Wend. 369. Had Morford known that he was taking more than six per cent (even though he had supposed that he was legally entitled to make his calculation in that way) would present a very different question. The law will infer a corrupt intent, where the fact of taking more than six per cent, *knowingly* is proved, but it cannot infer such intent where it is done in ignorance and mistake of *facts*.

As to the charge of one per cent for a draft, it was fairly put to the jury by the judge who tried the cause, and their finding is conclusive upon that question. They were told that if the charge of one per cent were unreasonable, and a part of the original agreement to discount the note, and if it were made corruptly, as a contrivance and with a design to evade the statute, it was usurious. This was doubtless the law, and the jury have, it is to be presumed, rightly applied the law thus given them, to the facts of the case. For reasons before stated, this rule must be made absolute.

HORNBLOWER, C. J., FORD and NEVINS, JJ., concurred. WHITE, J., did not hear the argument, and gave no opinion.

Rule made absolute.

INSTRUMENT MUST BE EXHIBITED.

§ 76.

Waring v. Betts (1893), 90 Va. 46, 44 Am. St. Rep. 890.

Action on a negotiable note against J. L. Waring, W. L. Waring, Jr., and J. D. Blair, maker and indorsers of the said note, by E. Betts, the owner of the same. The note was negotiable and payable at the Business Men's Bank, but at its maturity the bank had gone out of existence and had distributed its assets. Demand for payment was made on W. L. Waring, Jr., one of the indorsers and manager of the said bank, at his place of business at 2:30 P. M. of August 29, 1892. He refused to pay on the ground that

he was not authorized to represent said Business Men's Bank; that the funds of the bank had all been distributed; that he had no assets in his hands belonging to the bank.

Later in the day, at 5:30 P. M., the note was taken by a notary to the office of W. L. Waring, Jr., but that being closed it was taken to the residence of Waring and presentment sought to be made there. Failing to find Waring at either place, the note was duly protested and notice was given to the indorsers. Judgment was rendered for the plaintiff and defendant applied for and obtained a writ of error.

Berkeley & Harrison, for plaintiffs in error.

E. E. Bouldin, for defendant in error.

LACY, J., (after stating the case) delivered the opinion of the court.

The first question arising here is that raised by the demurrer. The declaration states a good case, and sets forth that on its due day it was duly presented for payment of the sum of money therein specified, required, payment refused, and that it was duly protested, &c.

And the defendants' demurrer to the plaintiff's declaration was properly overruled.

The claim of the defendants is that there was no presentment of the note, because when payment was demanded of the indorser, W. L. Waring, Jr., manager of the late Business Men's Bank, Mr. Glenn did not have the note in his possession, and could not have presented it, but as has been seen from the facts found by the jury, payment was refused by Waring, and the note not asked for, but payment refused, and the statement made that he was not authorized to represent the bank which had ceased to do business and had distributed its assets.

Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself; or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand ready to be delivered, and such must really be the case. This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of, upon paying the amount. If, on demand of payment the exhibition of the instrument is not asked for, and the party of whom demand is made decline on other grounds, a formal presentment by actual exhibition of the paper is considered as

waived. (Dan. on Neg. Inst., p. 485, § 654; citing *Lockwood v. Crawford*, 18 Conn., 361, and *Fall River Union Bank v. Willard*, 5 Metcalf, 216).

All the parties subsequent to the principal payer are bound only as his guarantors, and promise to pay only on condition that a proper demand of payment be made, and due notice be given to them in case the note or bill is dishonored. And we repeat this as one of the fundamental principles of the law of negotiable paper; and the infrequency and the character of the circumstances which will excuse the holder from making this demand, and still preserve to him all his rights as effectually as if it were made, will illustrate the stringency of the rule itself. Parsons on Notes and Bills, Vol. I., 442. The question of excuse, then, will depend upon whether due diligence has been used, and presents the ordinary inquiry as to negligence. The principal excuses resolve themselves into two classes—

First. The impossibility of demand.

Second. The acts, words, or position of a party, proving that he had no right, or waived all right to the demand of the waiver of which he would avail himself.

That impossibility should excuse non-demand is obvious, for the law compels no one to do what he cannot perform. But it must be actual and not merely hypothetical; and though it need not be absolute, no slight difficulty will have this effect. *Id.*

The circumstances which will excuse a demand are such generally as apply to a failure to present and demand payment within the required time, not absolutely. Parsons, 444, 445.

In this case the presentment of the note was not made at bank within the usual bank hours, with the note in possession, but as we have seen, this was excused in this case (1) by the fact that there was no bank to present it at, and (2) because payment was refused upon the ground that the bank had ceased to do business, and its assets distributed, and the note was not asked for, nor required, payment being refused on other grounds, the right to have it produced must be considered as waived.

The note, however, was carried, during the day, to the place of business of the late manager of the bank, and the indorser sought to be charged, and this being closed, it was carried to his residence, and that being also closed, it could not be presented to him, and although it was not in banking hours, it was during the day time and before the hours of rest.

When the note is payable at a bank, it is to be presented during banking hours; and the payer is allowed until the expira-

tion of banking hours for payment. But when not to be made at bank, but to an individual, presentment may be made at any reasonable time during the day during what are termed business hours, which, it is held, range through the whole day to the hours of rest in the evening. (Parsons, 447, citing *Cayuga County Bank v. Hune*, 2 Hill, 635; *Nelson v. Fotherall*, 7 Leigh, 194).

And in the case of *Fainsworth v. Allen*, 4 Gray, 453, a presentment made at 9 P. M. at the maker's residence, ten miles from Boston, when he and his family had retired, was held sufficient.

And in *Barclay v. Bailey*, 2 Camp. 527, Lord Ellenborough sustained a presentment made as late as 8 P. M. at the house of a trader.

It is only when presentment is at the residence that the time is extended into the hours of rest. If it is at the place of business, it must be during such hours when such places are customarily open, or, at least, while some one is there competent to give an answer. (Parsons, 448).

In this case there was no presentment to the maker, who could not be found, which, however, was unnecessary under section 2842 of the Code of Virginia. The protest was in due form, and duly protested, which was authorized by section 2849 of the Code, although the said note was payable at a bank in this State. And under section 2850 is *prima facie* proof of the facts stated therein, and are substantially in accordance with the finding of the jury. It therefore appears that such presentment as was requisite was made to the indorser and late manager of the bank, and that it was impossible to present the same at the bank named therein, as it had ceased to exist. We must, therefore, conclude that there has been sufficient diligence on the part of the plaintiff, and that the judgment of the court below in his favor was right, and should be affirmed.

Judgment affirmed.

PRESENTMENT WHERE INSTRUMENT PAYABLE AT BANK. § 77.

Chicopee Bank v. Philadelphia Bank (1869), 8 Wall. 641.

This was a suit by the Seventh National Bank of Philadelphia against the Chicopee Bank of Springfield, Massachusetts, founded upon the allegation, that by reason of the neglect of the latter bank, the former lost its remedy against the prior parties on a bill of exchange, to wit, the drawer and payee.

The bill was drawn by one Coglein, of Philadelphia, on Mor-

tague, of Springfield, payable to one Rhodes, of Philadelphia, for \$10,000, and accepted by Montague specially payable at the Chicopee Bank. The day of payment was Saturday, February 18th, 1865. On the 13th, Rhodes, the holder, indorsed the bill for value to the Philadelphia Bank, which sent it at once by mail, inclosed in a letter, to the Chicopee Bank, to receive payment. The course of the mail between Philadelphia and Springfield, is two days. On the 15th, this letter with other letters and papers, was duly delivered by the postman, and placed on the cashier's table; but (as was afterwards ascertained), this letter slipped from the pile, through a crack in the table, into a drawer of loose papers, and its presence in the bank was not known to the cashier, and as the two banks had no previous dealings, he was not expecting anything from the other bank. On the 18th, Montague, the acceptor, made no attempt to pay the bill, either by calling for it, or depositing funds, and subsequently, at the trial, made oath that he intended not to pay the bill, and had a defence against it. The cashier of the Philadelphia bank, not receiving, on the 17th, an acknowledgment of the letter which he had sent on the 13th, felt somewhat anxious; and on the 18th consulted the president. On Monday, the 20th, he telegraphed to the cashier of the Chicopee Bank as follows:

"Did not you receive ours of 13th instant, with Montague's acceptance, \$10,000?"

The dispatch did not indicate either the time or place of payment of the draft; and the reply was sent,

"Not yet received."

This dispatch was received by the cashier of the Philadelphia bank, at noon of the 20th. He testified at the trial, that he wrote to Mr. Rhodes the same day, informing him of what he had learned, that he had no recollection of writing to Coglin, but, as he knew they were jointly concerned in dealings in petroleum lands, he presumed Rhodes would inform him. This was the only step the cashier took toward charging the prior parties. They both did business at that bank; Coglin was a director; both were frequently there, and well known to the cashier. As the mail required two days, and the 19th was Sunday, there was no question but the cashier had until and including the 24th, to give notice to Rhodes and Coglin. After the receipt of the reply of the 20th, at noon, he took no steps, by post or telegraph, to ascertain from the Chicopee Bank whether the acceptor had or had not been ready to pay on the 18th. The Philadelphia bank

brought no suit against Rhodes or Coglin, but sued the Chicopee Bank for the amount of the note, on the ground that by its negligence, they had lost the power to charge the prior parties.

The court below instructed the jury, that the prior parties were absolutely discharged by what took place at the Chicopee Bank, on the 18th; that where a bill is accepted payable at a particular bank, the bank need not seek the acceptor, but that there must still be a presentment, in order to charge prior parties; that the presence of the bill at the bank, ready to be delivered to the acceptor upon his tendering payment, was equivalent to a presentment; but that if the bill is not at the bank on the day of payment, ready to be delivered as aforesaid, there is a failure of presentment, and the prior parties are discharged, although the acceptor made no attempt to pay; that in this case, therefore, the prior parties could not be held by any notice of whatever description, whenever or by whomsoever given; and that if the loss or mislaying of the bill during the whole of the 18th, was owing to the negligence of its cashier, the Chicopee Bank was liable for the amount of the note.

After the charge was fully delivered, the court was asked by the counsel of the Chicopee Bank, to instruct the jury as to the burden of proof. This the court refused to do, considering that it had already sufficiently instructed the jury.

The verdict and judgment were accordingly for the plaintiffs.

R. H. Dana, Jr., for the Chicopee Bank, plaintiffs in error.
Mr. George Putnam, contra.

Mr. Justice NELSON delivered the opinion of the court.

The case was put to the jury, whether or not the loss of the bill, and consequent inability of the collection bank to take the proper steps against the acceptors to charge the prior parties, was attributable to negligence, and want of care on the part of the Chicopee Bank, and that, if it was, the bank was responsible. The jury found for the plaintiffs.

In cases where the drawee accepts the bill, generally, in order to charge the drawer or indorser, the holder must present the paper, when due, at his place of business, if he has one, if not, at his dwelling or residence, and demand payment; and, if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place, and payment demanded. In these instances, as a general rule, the bill must be present when the demand is made, as in case of payment the acceptor is entitled to it as his

voucher. When the bill is made payable at a bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to payment of the paper, constitute a sufficient presentment and demand; and, if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is, that the paper was in the bank, and the burden rests upon the defendant to show that the acceptor called to pay it. (*Chitty on Bills*, p. 365 *a*, 353, Springfield ed. 1842; 1 *Parsons on Notes and Bills*, pp. 363, 421, 437; *Byles on Bills*, p. 251 and note; *Fullerton v. Bank of United States*, 1 Peters, 604; *Bank of United States v. Carneal*, 2 Id. 543; *Seneca Co. Bank v. Neas*, 5 Denio, 329; *Bank v. Napier*, 6 Humphry, 270; *Folgar v. Chase*, 18 Pickering, 63.

In the present case, it is argued that the bill was in the Chicopee Bank at the time of its maturity, and, as the acceptors had no funds there, a sufficient presentment and demand were made, according to the law merchant. It is true the bill was there physically, but, within the sense of this law, it was no more present at the bank than if it had been lost in the street by the messenger on his way from the post-office to the bank, and had remained there at maturity; and this loss, which occasioned the failure to take the proper steps, or, rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties, and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant. The radical vice in the defence being the failure to prove a presentment and demand upon the acceptors at the maturity of the bill, the question of notice is unimportant.

But, if it had been otherwise, the notice itself was utterly defective. That relied on is the answer of the defendant to the telegram of the plaintiff of the 20th February, which was, that the bill had not yet been received. This was after its maturity, and it simply advised the holder and payee indorser, to whom the information was communicated the same day, that the drawer and indorser were discharged from any liability on the paper. It showed that the proper steps had not been taken against the acceptors to charge them.

Some criticism is made upon the refusal of the court below to charge, as to which side the burden of proof belonged, in respect to the question of negligence and want of care, after the paper came into the hands of the defendant. No objection is taken to the charge itself, upon this question, and, indeed, could not have been, as the point was submitted to the jury as favorably to the defendants as could have been asked. We think the court, after having submitted fairly the evidence on both sides bearing upon the question, had a right, in the exercise of its discretion, to refuse the request.

If, however, the court had inclined to go further, and charge as to the burden of proof, it should have been that it belonged to the defendant. The loss of the bill by the bank carried with it the presumption of negligence and want of care; and, if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is that the loss or damage was occasioned by his negligence, or want of care of himself or of his servants. This presumption arises with respect to goods lost or injured, which have been deposited in a public inn, or which had been intrusted to a common carrier. But the presumption may be rebutted. (*Dawson v. Chamney*, 5 Q. B. 164; *Coggs v. Bernard*, 2 Lord Raymond, 918; *Day v. Riddle*, 16 Vermont, 48; 1 Phillips on Evidence, Cowen's & Hill's Notes, p. 633).

Judgment affirmed.

WHEN PRESENTMENT NOT REQUIRED TO CHARGE INDORSER. § 82.

Am. Nat. Bank v. Junk Bros. (See page 420.)

EXCUSE FOR FAILURE TO MAKE PRESENTMENT IN DUE TIME. § 83.

Windham Bank v. Norton et al. (1852), 22 Conn. 213, 56 Am. Dec. 397. See § 107.

This was an action of *assumpsit*, brought by the Windham Bank, as holders of a bill of exchange, against the defendants, as indorsers.

The bill of exchange referred to was drawn by George Hobart, of Norwich, in this state, upon Mansfield, Hall & Stone,

of Philadelphia, and by them accepted, for \$417.26; dated January 31, 1849, and payable four months after date, to the order of the defendants.

The declaration was in the common form, and contained the usual averments of a due presentment of the bill in question, and notice of its non-payment. The defendants pleaded the general issue, and the cause came on for trial, at Brooklyn, October term, 1851. The facts were found by the court, by agreement of the parties, as follows: Said bill of exchange was, on the day of its date, accepted by said Mansfield, Hall & Stone "payable at the Farmers and Mechanics' Bank," in the city of Philadelphia. On the — day of February, 1849, the defendants procured said draft to be discounted by the plaintiffs, and then indorsed and delivered it to them. During the same month of February, the plaintiffs forwarded said draft, by the United States' mail, to the Ohio Life and Trust Co., a banking corporation in the city of New York, for collection, and indorsed the same to their cashier, as follows: "Pay G. S. Coe, Esq., cashier, or order;" signed, "Samuel Bingham, cashier." The bill, so indorsed, was, in a day or two thereafter, and in due course of mail, received by said Ohio Life and Trust Co. The third day of grace, June 3d, being Sunday,—the draft was actually due and payable on Saturday, June 2. During the year 1849, there were two mails per day, each way, between New York and Philadelphia,—those for the latter place, leaving New York, one at nine A. M., the other at four and a half P. M., and both due at Philadelphia, in five hours from their departure. The Farmers and Mechanics' Bank were the Philadelphia correspondents of the Ohio Life and Trust Co., and communications, by mail, passed between them daily. On the morning of June 1st, the cashier of the Ohio Life and Trust Co., inclosed this draft with others, addressed, in the proper and usual mode, to the Farmers and Mechanics' Bank, and deposited said letter in the United States' post-office, at the city of New York, in season for the afternoon mail of that day, for Philadelphia. That letter was duly deposited in said mail, and said mail left New York, and arrived at Philadelphia, in due and usual time; but the mail-bags, containing the letters for Philadelphia, were, by the post-office clerks in the office at New York, marked to be forwarded to Washington, and were, therefore, not delivered at Philadelphia, but carried to Washington. At Washington the mistake was discovered, and said mail-bags forwarded to Philadelphia, which place they reached in the course of Sunday, June 3d. On the morning of the next day,

said letter, with the draft inclosed, was delivered from the post-office at Philadelphia, to said Farmers and Mechanics' Bank, who, by their cashier, refused payment of the same, and between the hours of nine and ten A. M., of the day, placed said draft in the hands of a notary public, for protest. Said notary, between the hours of nine A. M. and three P. M., of said day, presented said draft at the counter of said bank for payment, and received for answer from said cashier, that he was ordered by the acceptors not to pay it, and that had he presented it on Saturday, June 2nd, he should have given him the same answer. Said notary thereupon, on said 4th day of June, in due and proper form, protested said draft, and made out written notices to the drawer, and the several indorsers, of the non-payment of said draft, and inclosed said notices, with the notice of protest, in a letter, and on the same day, deposited the same in the post-office in said Philadelphia, duly addressed to George S. Coe, cashier of Ohio Life and Trust Co., New York, who had indorsed said draft to the Farmers and Mechanics' Bank, and by whom said letter was, in due course of mail, received. Said Coe, on the same day in which he received them, inclosed said letter of protest and said notices, except the one to himself, in a letter duly addressed to the plaintiffs, and deposited the same in the city of New York, in season for the next mail. The same was, in due course of mail, received by the plaintiffs, who, on the day of the receipt thereof, inclosed said notices to the defendants, as indorsers, and said notice to said drawer (his residence being unknown), in a letter duly addressed to the defendants, and deposited it in the post-office at Windham, in season for the next mail, and the same was, in due course of mail, received by the defendants. Mansfield, Hall & Stone became insolvent, and suspended payment on the 12th day of April, 1849, and on the next day, sent to the Farmers and Mechanics' Bank, the following notice in writing:

"E. N. LEWIS, Esq., Cash.

"You will please pay no more notes or drafts drawn by us, and payable at your bank, until further notice, as they will not be provided for. Very respectfully yours,

"MANSFIELD, HALL & STONE."

No further notice was sent, and said bank, from that time forward, acted upon this order, and refused payment of all notes or drafts payable at the bank, by said firm. The business hours of the Philadelphia banks were, in 1849, from nine A. M. to three P. M. Owing to the miscarriage of the United States' mail, as

above stated, said draft was not presented for payment, on Saturday, June 2d, when it became due, and was never presented for payment at any other time than on said 4th day of June.

It has been the usage of the banks and merchants of the country, for the last forty years, to make use of the United States' mail, in forwarding negotiable notes and bills of exchange, for collection or acceptance. It is the custom of the Windham Bank, and the four Norwich banks, to forward all paper in their hands, payable abroad, within five or eight days after it comes into their hands, without reference to the length of time it has to run.

The questions of law arising upon these facts, and on such further facts as the jury might rightfully infer, were reserved for the advice of this court.

Edmund Perkins, for the plaintiffs.

Strong & Foster, for the defendants.

STORRS, J. The defendants first insist, that the averments in this declaration, of a due presentment of the draft in question and notice of its non-payment, must be strictly proved, and that they are not sustained, by proof of the facts set up by the plaintiffs, by way of excuse. Whatever may be the course of authorities elsewhere, it is well settled here, that those allegations are supported by evidence of matter of excuse, or a waiver of demand and notice. *Norton v. Lewis*, 2 Conn. R., 479, and *Camp v. Bates*, 11 id., 478, are decisive on this point.

The other and more important question in this case is, whether the plaintiffs are excused for the non-presentment of this draft for payment, on the day when it became due. The last day of grace being Sunday, it was payable on the preceding Saturday, which was the second day of June, 1849. This question depends on whether the plaintiffs are chargeable with negligence, in not presenting it on that day.

If the agent of the plaintiffs, to whom they sent it, to be forwarded for presentment and collection, and who transacted this business for them, was guilty of such negligence, it is, of course, imputable to the plaintiffs. And it is not important to this question, either that the defendants in fact sustained no damage, by the draft not having been presented for payment, when it fell due, or that it would not have been paid by the acceptor, if it had then been presented. The indorser, on a question of due presentment for payment, is not affected by either of these circumstances. Nor indeed do the plaintiffs claim to recover, on either of these grounds.

The question of negligence here presented depends on the inquiry, whether, under the circumstances of this case, the delay of the plaintiffs' agent, in not forwarding this draft to Philadelphia, until the last mail left New York for that place, on the day next preceding that on which the draft fell due, constituted a want of reasonable or due diligence, in regard to its presentment. We say, under the circumstances, because there is no positive or absolute rule of law, which determines within what precise time the holder of a bill of exchange must, in all cases whatever, or at all events, avail himself of the authorized mode of transmission adopted in this instance, to forward such paper for presentment. The general principle, established by all the adjudged cases, as well as the approved elementary writers, is, that reasonable diligence in the presentment of a bill for payment, is required of the holder, and that, therefore, if there has been no want of such diligence, he is excused. Story on Bills, ch. 10; Chitty on Bills, ch. 9, 10; Story on Prom. Notes, ch. 7, § 368; *Patience v. Townley*, 2 Smith's R., 223, 224.

In applying this principle, the general rule is, that it must be presented for payment, on the very day in which, by law, it becomes due, and that, unless the presentment be so made, it is a fatal objection to any right of recovery against the indorser. But, although this is the general rule, it is not an universal one, and prevails only under the qualification, which is really a part of the rule itself, that there is no negligence or want of reasonable diligence, in not making such presentment. The whole rule, therefore, more properly stated, is, that the presentment must be on the day on which the bill becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it. By the very statement of this rule, as thus fully expressed, it is plain that, on the question, whether the holder is excused on this ground, for not thus presenting it, or, in other words, whether there was negligence on his part, or a want of reasonable diligence, no absolute or positive rule can, from the nature of the case, be laid down, which shall apply under all circumstances. We have no evidence of any general custom of merchants, in regard to the precise time, within which mercantile paper is usually forwarded, in order to be presented for payment, so that the law merchant furnishes us no guide on this point. And it is clear, that the strict rule of the common law, by which an inability to perform the terms or condition of a contract, by reason of inevitable accident or casualty, constitutes generally no excuse for their non-performance, is not applicable to mercantile

instruments of this description. Therefore, the excuse for non-presentment in this case, presents the ordinary question of negligence. That question may, and often does, depend on such a variety of circumstances, or those of such a peculiar character, that it is very difficult, if not impossible, to reduce them to any fixed or invariable rule. But, in regard to such a question, as applicable to the non-presentment of a bill or note, when it is due, it is considered a well settled rule, that such want of presentment is excused, by any inevitable or unavoidable accident not attributable to the fault of the holder, provided there is a presentment by him, as soon afterward as he is able; by which is intended that class of accidents, casualties or circumstances which render it morally or physically impossible to make such presentment. Judge Story, in speaking of this ground of excuse, says: "It has been truly observed, by a learned author," referring to Mr. Chitty, "that there is no positive authority in our law, which establishes any such inevitable accident to be a sufficient excuse for the want of a due presentment. But it seems justly and naturally to flow from the general principle, which regulates all matters of presentment and notice, in cases of negotiable paper. The object, in all such cases is, to require reasonable diligence on the part of the holder; and that diligence must be measured by the general convenience of the commercial world, and the practicability of accomplishing the end required, by ordinary skill, caution and effort." And he cites the remark of Lord Ellenborough in *Patience v. Townley* (2 Smith's R., 223, 224,) that due presentment must be interpreted to mean, presented according to the custom of merchants, which necessarily implies an exception, in favor of those unavoidable accidents, which must prevent the party from doing it within regular time. (Story on Bills, § 258.)

Applying these principles to this case, we are of opinion that the plaintiffs are not chargeable with a want of reasonable diligence.

No fault or impropriety is imputable to them, by reason of their having selected the public mail, as the mode of forwarding the draft in question, to the bank in Philadelphia, where it was payable. It is properly conceded by the defendants, that such mode of transmission was in accordance with the general commercial usage and law, in the case of paper of this description. Indeed, it is recommended in the books, as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance. But, although the public

mail was a legal and proper mode by which to forward this paper, it was their duty to use it in such a manner, that they should not be chargeable with negligence, or unreasonable delay. If, therefore, they put the draft into the post-office, at so late a period that, by the ordinary course of the mail, it could not, or there was reasonable ground to believe that it would not, reach the place of its destination, in season for its presentment, when due, we have no doubt that there would be, on their part, a want of reasonable diligence, which would exonerate the indorser. On the other hand, to throw the risk of every possible accident, in that mode of forwarding the draft, upon the holder, where there has been no such delay, would clearly be most inconvenient, unreasonable and unjust, as well as contrary to the expectation and understanding of the indorser, who is presumed to be aware of the general usage and law, in regard to the transmission, by mail, of this kind of paper, and must therefore be supposed to require only reasonable diligence in this respect, on the part of the holder; and would, indeed, be inconsistent with the rule itself, which sanctions its transmission in that manner. It has been suggested, that the principle should be adopted, that when the holder resorts to the public mail, he should be required to forward the presentment, at so early a period, that if by any accident it should not reach the place of its presentment, in the regular course of the mail, there should be time to recall it, and have it presented when and where it falls due; or that, at least, it should be forwarded in season to ascertain whether it reached there by that time, and to make such a demand or presentment for payment, as is required in the case of lost bills. We find no authority whatever for any such rule, nor would it, in our opinion, comport with the principle now well established, requiring only reasonable diligence, on the part of the holder, or with the policy which prevails in regard to such commercial instruments. It would, in the first place, be the means of restraining the transfer of such paper within such a limited time as to impair, if not to destroy, its usefulness and value, arising out of its negotiable quality; and, in the next place, it would, in many cases, be wholly impracticable. The casualties, incident to this mode of transmission, are most various in their character, and can not, of course, be foreseen; and they might, in the case of forwarding mercantile paper, be such as to render it impossible to ascertain its miscarriage, or to recall it, in season to remedy the difficulty. In the case of the draft now before us, for example, if it had been placed, by the plaintiffs, in the post-office at Windham, where

they were located, and transacted their business, for transmission, direct from thence to Philadelphia, on the very day when they became the holders of it, which was between three and four months before it became due, and, by an accident or mistake of the postmaster in the former place, similar to that which occurred in this case, at New York, it had been mailed to one of the most distant parts of our country, or to a foreign country, (which would not have been more singular, than that it should have been mistakenly mailed, as in the present case, for Washington,) it might not have been practicable for the plaintiffs to learn the accident, or obviate its effect, before the paper fell due. In short, such a rule as that suggested, would be merely artificial in its character, productive of great inconvenience and injustice in particular cases, without any corresponding general benefits, and change the whole course of business, in regard to a most extensive and important class of mercantile transactions. Nor has any other arbitrary or positive rule been suggested, which is not equally obnoxious to the same or similar objections.

The only remaining enquiry is, whether the plaintiffs are chargeable with negligence, for not forwarding the draft in question, by an earlier mail from New York to Philadelphia. It was sent by the usual, legal, and proper mode. It was deposited in the post-office, in season to reach the place where it was payable, before it fell due, by the regular course of the next mail; and there was no reason to believe, that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed, in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment, when due. It in fact reached that place, when it should have done; but was carried beyond it, in consequence of that mistake. As that mistake could not be foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed, they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume, that the latter had done his duty. They could not know, that he had misdirected the package, until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination, was, therefore, so far as the plaintiffs were concerned, an unavoidable accident. It happened, not in consequence of any delay of the plaintiffs, in putting the draft into the post-office, at so late a period that it could not, or probably would not, reach its destination in due

season, but merely in consequence of the act of the official to whom it was properly confided, done after it was properly in his charge, by the plaintiffs, for transmission. The accident, moreover, was of a very peculiar and extraordinary character, and quite different from those which are ordinarily incident to that mode of transmission, and against which it would be extremely difficult, if not impossible, to guard. It would have been equally liable to occur, at any time, when the draft should have been placed in the post-office. It was not owing, in any sense, to the fault of the plaintiffs, but solely to that of the postmaster. Under these circumstances, we do not feel authorized to impute any blame or negligence to the plaintiffs. We are, therefore, of opinion, that judgment should be rendered for the plaintiffs.

In this opinion, the other judges concurred.

Judgment for the plaintiffs.

Pier et al. v. Heinrichshoffen (1877), 67 Mo. 163, 29 Am. Rep. 501.

Appeal from St. Louis Circuit Court.

Fisher & Rowell and *Botsford & Williams*, for appellants.
Slayback & Haeussler, for respondents.

HOUGH, J. This was an action brought by the plaintiffs, as holders of a negotiable promissory note, against the defendants, as indorsers thereof. The questions presented for determination are, whether the plaintiffs used due diligence in making demand of payment, and gave the requisite notice of non-payment to the defendants. The facts are as follows: The note in question matured on the 4th day of July, 1861, and was payable at the banking house of F. & G. Willins, in the city of St. Paul, Minnesota. Some time in April, 1861, the plaintiffs delivered the same to the bank of Cooperstown, at Cooperstown, New York, for collection. At that time a letter, in due course of mail, would reach St. Paul from Cooperstown, in about six days. The cashier of the bank of Cooperstown sent the note by mail to its regular correspondent, the Bank of St. Paul, in the city of St. Paul, for collection, in ample time, as the cashier stated, for it to reach its destination by ordinary course of mail, before the maturity of the note. When the letter reached St. Paul, the Bank of St. Paul had made an assignment, and the envelope having printed on

it the words "From the Bank of Cooperstown," the postmaster at once returned it to the Bank of Cooperstown, with the indorsement "bank failed." The letter was received by the Cooperstown Bank in the original envelope, unopened, on the 9th day of July, 1861, and on the same day the note was returned by mail to St. Paul in a letter directed to F. & G. Willins, who caused it to be presented and protested on the 15th day of July, 1861, the day on which it was received.

The defendants contend that there was a want of diligence in not sending the note in time to guard against such contingencies as the evidence discloses, and that the action of the postmaster in the premises, is no sufficient excuse for the failure to present for payment on the day of the maturity of the note. Professor Parsons, in his treatise on Notes and Bills, says: "Ordinarily any failure to present a note at the proper time, by reason of the negligence of an agent, would discharge an indorser, but where the holder makes use of the public mail for the purpose of transmitting the note to the proper place in season to have a legal demand made, and without any negligence on his part, we should say that he would not lose his remedy on an indorser, if through any accident or disorder, or the negligence or mistake of the postoffice clerks, the note does not reach the destined place in season to make demand on the very day of maturity." Vol. 1, p. 461. In support of his text he cites the case of *Windham Bank v. Norton*, 22 Conn. 213, the leading features of which bear such a striking resemblance to the case at bar, that we think it proper to present them. The draft in that case was drawn upon and accepted by Mansfield, Hall & Stone, of Philadelphia, payable at the Farmers' & Mechanics' Bank, in said city, on the 2d day of June, 1849, and was indorsed by the defendants to the plaintiffs in the month of February, 1849. During the same month the bill was indorsed and delivered to the Ohio Life and Trust Co., a banking corporation, in the city of New York, for collection. At that time there were two mails per day from New York to Philadelphia; one leaving at 9 A. M. and one at 4 P. M., both of which were due at Philadelphia five hours after their departure. The Farmers' and Mechanics' Bank was the Philadelphia correspondent of the Ohio Life and Trust Co. On the morning of June 1st, the cashier of the Ohio Life and Trust Co. inclosed this draft with others, properly addressed to the Farmers' and Mechanics' Bank, and deposited said letter in the postoffice at the city of New York, in time for the afternoon mail, of that day for Philadelphia. This mail arrived at Phila-

delphia in due time, but the mail bags containing the letters for Philadelphia were, by the postoffice clerks in New York, marked to be forwarded to Washington, and were therefore carried to the latter place. The mistake was discovered at Washington, and the mail returned to Philadelphia, reaching there on the 3d of June, and on the next day, June 4th, payment was demanded and refused, protest made and notice given. In discussing the question of negligence, or reasonable diligence, the court said: "The only remaining inquiry is, whether the plaintiffs are chargeable with negligence for not forwarding the draft in question, by an earlier mail from New York to Philadelphia. It was sent by the usual, legal and proper mode. It was deposited in the postoffice in season to reach the place where it was payable, before it fell due, by the regular course of the next mail, and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed, in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place, when it should have done, but was carried beyond it, in consequence of that mistake. As that mistake could not have been foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the package, until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination, was, therefore, so far as the plaintiffs were concerned, an unavoidable accident."

We have been referred by defendants' counsel to the case of *Schofield v. Bayard*, 3 Wend. 488, as being in direct conflict with the case just cited from Connecticut; but a careful examination of the facts in *Schofield v. Bayard* will show that there is no conflict whatever between the two cases. The latter case contains an element of negligence on the part of the holder, which was absent from the case of *Bank v. Norton*, and which is wanting in the case at bar. The facts were, that a bill drawn by a firm in New York on a house in Liverpool was accepted *supra protest*, by a house in London. The bill was sent by the holder, who resided at Birmingham, to Liverpool for payment, instead of London, where it was payable. The holder's correspondent at Liverpool returned the bill in a letter to the holder, with advice

that the presentation should be made in London, and the letter was put in the postoffice, but by some oversight of the clerks in the postoffice, it did not get to Birmingham in time for the holder to forward it to London and have a regular demand made. It was held that the drawers were discharged. The court said: "This case presents no impossibility, if due diligence had been used. The plaintiff should not have sent the bill to Liverpool at all. It is true that after the letter containing it had been left at Liverpool, on the 10th of November, it could not have reached London in season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool, they should have sent it to London, and then it would have been in season, and probably would have been paid. I am of the opinion that, by the law merchant payment should have been demanded in London on the 12th of November, and that not having been done, and there being no impossibility to prevent it but what is attributable to the want of due diligence on the part of the holders, the defendants are legally discharged, and are entitled to judgment." It will be seen that the court places its judgment expressly upon the ground that the holder was guilty of negligence in sending the bill to Liverpool, and this fault of his produced the impossibility by virtue of which he claimed to be discharged. In the present case the letter containing the note was not misdirected; it was properly directed; it actually reached St. Paul in time, and but for its unauthorized return by the postmaster, the probabilities are that some agent or representative of the suspended bank would have received it in time to make due presentment, as the testimony tends to show that the representatives of the bank continued to receive letters addressed to it, after its suspension. The holders therefore exercised due diligence in sending the note when they did; its arrival in time demonstrates that fact; and they were not required to make provision in advance for a possible, but unanticipated suspension of the bank of St. Paul before arrival of their letter, or for an unwarrantable interference with the same by the public officer in charge of the mails, after its arrival. We are of the opinion, therefore, that under the circumstances of this case, the demand was seasonably made.

Objections are also made to the notice which was given by the notary. The certificates of protest are as follows: "Due notices of the foregoing presentment, demand, refusal and protest were put into the postoffice at St. Paul, as aforesaid, and directed as follows: Notice for Katharina Ambs, directed St.

Louis, Mo.: Notice for W. and R. Heinrichshoffen, directed St. Louis, Mo." And the notary testified, "I personally mailed such notices in the postoffice on the 15th day of July, A. D. 1861." The objection is that he did not say that he had prepaid the postage; and the court instructed the jury that this was necessary. This objection is rather hypercritical. The word mailed, as applied to a letter, means that the letter was properly prepared for transmission by the servants of the postal department, and that it was put in the custody of the officer charged with the duty of forwarding the mail. Indeed the words "put into the post-office," as used by the notary, have a technical significance which is well defined; and they are commonly employed to designate the duty of the holder in giving notice. Since the enactment of the laws requiring all mail matter to be prepaid, these words have been used by this court in the sense of mailed. *Renshaw v. Triplett*, 23 Mo. 220; *Sanderson v. Reinstadler*, 31 Mo. 485. In Story on Promissory Notes, § 328, (Ed. 1859,) it is said, "all that the law requires of the holder is due diligence to send the notice within the proper time; and he has done his whole duty, when he puts it into the proper postoffice in due season, and it is properly directed. The holder has no control over the acts, or operations, or conduct of the officers of the postoffice, and is not responsible for the accident or neglect which may prevent a due delivery of the notice to the party entitled to notice." It sufficiently appears in the present case that the notice was properly directed. The evident and only meaning of the notary's certificate is that the notice was mailed to the defendants at St. Louis, Mo.

The judgment will be reversed and the cause remanded.

All concur.

Reversed.

WAIVER OF PRESENTMENT AND DEMAND.

§ 84—3.

Ross v. Hurd, imp. (1877), 71 N. Y. 14.

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order denying a motion for a new trial, and directing judgment on a verdict.

This was an action upon a promissory note made by defendant Kingsbury, and indorsed by defendant Hurd for the accommodation of the maker. Hurd alone defended.

The evidence is sufficiently set forth in the opinion. The court at the close of the evidence nonsuited the plaintiff, to which plaintiff's counsel duly excepted.

J. McGuire, for appellant.

E. Countryman, for respondent.

ANDREWS, J. There was no demand or notice of non-payment of the note when it became due, and the plaintiff was not relieved from the necessity of making a demand and giving notice, by what occurred between the plaintiff and the defendant, at the interview on the first or second day of November, 1872, before the maturity of the note.

The evidence is that Kingsbury, the maker of the note, a few days before that time, had applied to the plaintiff to extend the time of payment ninety days, and the plaintiff consented to do so, if the note was kept good and secure. The plaintiff afterwards went to the bank and had the interview spoken of with the defendant. He informed the defendant of what had occurred between him and Kingsbury, and stated that he had come to make some arrangement with regard to the note. The plaintiff testifies: "I stated to him (Hurd) that I could let him (Kingsbury) have the money longer, if he kept it well secured or kept the note good (I don't recollect the exact words I used to him); and he said he guessed that could be fixed, and he would get Kingsbury in, or I was to, and I went out to look for him." The plaintiff then left the bank to find Kingsbury, but did not find him, and later in the afternoon returned to the bank to see the defendant; but, not finding him there, went away and did not see him again until after the note fell due. It is inferable, from this evidence, that the defendant was willing to continue his liability as indorser, but it was left to be arranged at an interview to be had between all the parties. There was no request by Hurd that the plaintiff would extend the time of payment of the note, nor was anything said by him which would justify the plaintiff in believing that he would dispense with demand and notice, or which was calculated to mislead the plaintiff. The conversation clearly contemplated a new and substituted arrangement to be made before the note matured for continuing the loan. The plaintiff, therefore, was not entitled to recover, on the theory that this transaction dispensed with the necessity of protest. It is quite evident, however, that the plaintiff either did not understand that demand, and notice was necessary to charge an indorser, or supposed that what occurred between him and the indorser, on this occasion, made a protest unneces-

sary. He waited until the expiration of the second ninety days, and then went to the bank, with Kingsbury, and had a second interview with Hurd; and the liability of Hurd, in this action, depends upon what took place on that occasion. Kingsbury desired a still further extension of ninety days, and he procured from the bank (the defendant, Hurd, counting out the money for him) the sum necessary to pay the interest on the note to that time, and paid it to the plaintiff; and the plaintiff then spoke to Hurd about the extension of time, and Hurd replied: "You and Kingsbury can fix that about as you are a mind to." The testimony proceeds as follows: "He (Kingsbury) asked how I (plaintiff) would fix it; whether I would have a new note, or what; and I told him if both parties agreed I would let the note stand just as it was; and Hurd turned around from us, and said, then I will waive protest." This closed the conversation, and the plaintiff left the bank, and waited until the expiration of ninety days from that time, when he called upon the defendant, and informed him that the note was due, and that he would have to collect it; and soon after, the defendant claimed that the note had not been protested, and declined to pay it.

Upon these facts the question is presented, whether the nonsuit was properly granted. When the parties met at the bank, on the second occasion referred to, Hurd had been discharged from his liability as indorser, by the neglect of the plaintiff to take the steps necessary to fix his liability. But it was competent for the defendant to waive the objection arising from the plaintiff's laches, and to renew and continue his liability as indorser, and debar himself from setting up, when sued on the note, the want of protest as a defense. If an indorser, with full knowledge of the laches of the holder in neglecting to protest a note or bill, unequivocally assents to continue his liability, or to be responsible, as though due protest had been made, he is held to have waived the right to object, and will stand in the same position as if he had been regularly charged by presentment, demand and notice. This assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language. It has been frequently held that a promise by the indorser to pay the note or bill, after he has been discharged by the failure to protest it, will bind the indorser, provided he had full knowledge of the laches when the promise was made. (*Trimble v. Thorne*, 16 J. R., 152; *Sto. on Prom. Notes*, §§ 359, 362, and cases cited). A promise, made under these circumstances, affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder; and the

law, without any new consideration moving between the parties, gives effect to the promise. The assent of the indorser to be bound, notwithstanding he has not been duly charged, may be established by any transaction between him and the holder, which clearly indicates this purpose and intention. In *Duryee v. Dennison* (5 J. R., 248), the action was against an indorser who had not been regularly charged by demand and notice. No demand of payment was made until the day after the note became due. To avoid the defense based on this ground, it was shown that, after the note became due, the attorney for the plaintiff called on the defendant and informed him of the non-payment by the maker, and that the plaintiff looked to him for payment. The defendant was told at the same time that the demand and notice was irregular, but the defendant "agreed to consider the demand and notice as made in due time, and himself liable as indorser." The court held, that this was equivalent to a promise of payment, and authorized a verdict for the plaintiff. Kent, Ch. J., said: "We are of opinion that the testimony of Aiken, as given at the trial, was sufficient to support the verdict. The law is now settled that if an indorser has not had regular notice of non-payment by the drawer, yet if, with knowledge of that fact, he makes a subsequent promise to pay, it is a waiver of the want of due notice, and assumpsit will lie."

In the case at bar, we think the jury would have been authorized to find that the defendant, with knowledge of the fact that the note had not been protested, consented to be liable as indorser upon the note, and that his indorsement should stand as security to the plaintiff; and also the further fact that the plaintiff, in consideration of this consent, agreed to extend the time of payment of the note, and that such consent was given to induce such extension, without exacting a new security. In construing the transaction, the jury were entitled to consider the surrounding circumstances. The defendant was a banker, and familiar, as may be presumed, with the rules regarding the protest of commercial paper. His words, "I will waive the protest, then," had no significance, unless they were intended to remove the objection arising from the prior laches of the holder, in neglecting to protest the note at maturity. He intended, as is manifest, to continue his liability as indorser for the security of the plaintiff. He seemed to be willing to become obligated on a new instrument, or to renew his liability on the old one, as the plaintiff and Kingsbury should arrange. And the plain inference from the conversation is, that the plaintiff consented to let the old note stand, on

consideration that the defendant continued liable thereon; and the defendant's declaration could mean nothing less than that he would make no question as to the protest of the note, or as to his liability as an indorser. This case is stronger in reason, for holding the indorser, than where there is a simple promise to pay after maturity. The transaction here, not only indicates an intention on the part of the indorser to remain bound, notwithstanding his discharge, but the waiver of the laches of the plaintiff was the consideration for the extension, given by the plaintiff to the maker.

The nonsuit was improperly granted, and the judgment should be reversed, and a new trial ordered.

All concur, except FOLGER and MILLER, JJ., absent.

Judgment reversed.

In re Swift (1901), 106 Fed. 65.

In Bankruptcy.

Bancroft G. Davis, for Foreman, an objecting creditor.
Elder, Wait & Whitman, for Burleigh.

LOWELL, District Judge. Under St. Mass. 1898, c. 533, §§ 63, 64, Hodges was an indorser of the note in question. By sections 70 and 82 of the same act, presentment for payment was necessary to charge him as indorser, "except as herein otherwise provided." The first exception relied on by the creditor is found in section 79: "Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument." The appealing creditor of the joint estate contends that section 79 applies only to the drawer of a bill of exchange, and not to the indorser of a promissory note. In some cases it is said or assumed that the rights of a drawer of a bill of exchange regarding demand and notice are the same as those of an indorser of a promissory note (see *Bank v. Fulmer*, 3 Pa. St. 399), but it is at least doubtful if the assumed identity governs the construction of a statute like that before the court. where the words drawer, maker, indorser, etc., appear to be used in their discriminated sense. It is not necessary to decide this point, in view of the construction put upon other sections of the act.

The second exception insisted upon is that found in section 82: "(3) By waiver of presentment, express or implied." No

express waiver is here shown, and the case turns upon the existence or absence of waiver implied from the facts agreed by the parties and stated by the referee. St. Mass. 1898 is intended to supersede all other statutes relating to promissory notes, and, as it does not purport merely to rearrange statutes previously existing, there is no strong presumption that any one of its provisions is merely a codification of the law previously existing. When it attaches certain results to an implied waiver of demand, however, a court called upon to define such waiver may appropriately look at definitions of the term previously established. When the legislature of Massachusetts used the words, "waiver of presentment, express or implied," it may be supposed to have used these words in the meaning consistently attributed to them by the courts of Massachusetts. In *Kent v. Warner*, 12 Allen, 561, 563, Mr. Justice Foster said, in delivering the opinion of the supreme court:

"Strictly speaking, a waiver is an intentional relinquishment of a known right; but where the indorser of a note by words or acts has in fact misled and put the holder off his guard and reasonably induced him to omit due presentment for payment and notice of nonpayment, he is deemed in law to have waived the performance of these ceremonies, because it would be inconsistent with good faith on his part to insist upon a condition compliance with which had been prevented by his own conduct."

That which puts the holder off his guard is said to be waiver, in other cases, among them *Gordon v. Parmelee*, 15 Gray, 413, 422; *Armstrong v. Chadwick*, 127 Mass. 156.

Do the facts stated in the referee's certificate establish that the holder of the note was reasonably put off his guard by the acts of Hodges? I think they do. Hodges was liable on the note both as maker and indorser. About a week before maturity he consulted with the holder regarding a general assignment of the firm and its partners, which assignment was made as a result of the consultation. The note was discussed, and Hodges told the holder that neither the firm which made the note, nor he himself, the partner who had indorsed it, could pay it at maturity. It is not necessary to decide that, where the maker and indorser of a note are quite separate persons, the bare statement by the indorser that the maker will not pay operates to excuse demand. Here the maker and indorser were, in an important sense, the same person. Hodges said, in effect, "I cannot pay you this note either as maker or as indorser." Doubtless he might have added, "In spite of the fact just stated, I require you to go through the

useless ceremony of demanding payment." Had he said this, there would have been no waiver; but, in the absence of such a reservation, I think that the holder reasonably understood him to waive the useless ceremony. Upon this understanding the holder acted. It should be noticed that Hodges and his creditor were not dealing at arm's length, or as opposing parties, but were conferring about the general condition of Hodges' affairs.

In construing a term found in a statute of Massachusetts, and previously defined in Massachusetts decisions, it may be sufficient to refer to those decisions. As the statute in question is intended to introduce uniformity into the laws of the several states, it would be unfortunate, however, if the Massachusetts decisions concerning waiver of demand were opposed to a great weight of authority elsewhere, and to the law merchant as generally laid down. I do not find that opposition exists. The definitions in 2 Daniel, Neg. Inst. (4th Ed.) § 1103, and in 2 Pars. Notes & B. (2d Ed.) p. 582, are similar to those declared by the supreme court of Massachusetts. In *Bank v. Dill*, 5 Hill, 403, no waiver of demand was understood by the creditor at the time the alleged waiver took place. It was set up as an afterthought to excuse a mistake concerning the date of the note. When the holder was asked by the indorser why the note had not been presented for payment, he answered that presentment would be made that same afternoon, and claimed a waiver only after he had found out, to his surprise, that this presentment would be too late. In *re Grant*, Fed. Cas. No. 5,691, the court found that the waiver, so far as there was one, was not made with any regard to the indorsement, and that all parties were considering only the rights of the maker. In the case at bar the indorsement was expressly referred to. I hold, therefore, that there was no implied waiver of presentment, within the purview of the statute.

That waiver of presentment for payment, and knowledge of nonpayment arising from the identity of the maker and indorser, taken together, will excuse notice of nonpayment, is a conclusion so sensible that it must stand unless plainly opposed to the words of the statute. That this is the law merchant is not denied. To present for payment in order to charge an indorser, where the indorser has already told the holder that he cannot pay the note either as maker or as indorser, seems a useless ceremony, but it is a matter of substantial importance, by comparison with giving notice to the indorser who has waived presentment, that he, the indorser, has not paid the note as maker. The notice, if given, would run substantially thus: "Please take notice that you have

not paid the note which, in accordance with our agreement, I have not presented to you for payment." The facts which were held to constitute a waiver of demand were held also to constitute a waiver of notice in most or all the cases above cited. Waiver of notice seems to have been implied from waiver of presentment.

That notice would be excused by waiver, even in the absence of an express provision of statute, I am inclined to think; but this case seems fairly covered by the statute itself. By section 115, notice of dishonor is not required "where the indorser is the person to whom the instrument is presented for payment." The instrument here was not presented to Hodges for payment, because he had given the creditor to understand that presentment would be useless. The exception was inserted to avoid the necessity of giving notice of a fact which, by the terms of the exception, must be within the personal knowledge of the man notified. It is no straining of language to hold that the term, "person to whom the instrument is presented for payment," includes a person to whom the instrument would have been presented if he had not, both as maker and as indorser, waived such presentment. The creditor is therefore entitled to prove against Hodges' separate estate.

The proving creditor seeks to review the decision of the referee in deducting from the amount proved against the separate estate the amount of the dividend declared on the joint estate. That a creditor may prove for the full amount of a note against both its maker and indorser, and may collect from both estates dividends on such proof until his whole debt is satisfied, is settled law. Where, however, proof against the estate of the indorser is made after part payment by the maker, the proof must be limited to the balance due on the note after deducting the part payment. And it appears to be settled that a dividend from the estate of the maker, declared in favor of the creditor, and payable before proof is made against the estate of the indorser, is the equivalent of actual part payment. In this case, proof against the estate of the maker was made after the declaration of the first dividend. By section 65c, the creditor making proof after the declaration of the first dividend is entitled to be paid "dividends equal in amount to those already received by the other creditors, if the estate equal so much before such other creditors are paid any further dividends." This right of the creditor to a preference in future dividends does not seem to me equivalent to a declaration of a dividend in his favor, or to actual part payment of the

note. *In re Hicks*, Fed. Cas. No. 6,456; *In re Hamilton* (D. C.) 1 Fed. 800; *In re Meyer*, 78 Wis. 615, 626, 48 N. W. 55, 11 L. R. A. 841; *Ex parte Todd*, 2 Rose, 202, note. The estate might not be large enough to pay to this creditor the rate declared in favor of the other creditors. Considering the situation as shown in the finding of the referee and in the subsequent stipulation, I think the creditor was entitled to prove for the whole amount of the note against the estate of the indorser.

The judgment of the referee is reversed, in so far as it provides for a diminution of the proof presented against the separate estate of E. C. Hodges; in other respects it is affirmed.

SECTION IX.—PROTEST.

GENERAL REQUISITES OF THE PROTEST. § 155-158.

Dennistoun et al. v. Stewart (1854), 17 How. (58 U. S.) 606.

This case was brought up, by writ of error, from the circuit court of the United States for the southern district of Alabama. The case is stated in the opinion of the court.

It was argued by *Mr. Phillips*, for the plaintiffs in error, no counsel appearing for the defendant.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs declared against the defendant, as drawer of a bill of exchange, by the name and style of James Reid and Co., of which the following is a copy:

"No. —. £4,417 14s. 11d. st'g. MOBILE, Sept. 9, 1850.

"Sixty days after sight of this first of exchange, (second and third unpaid,) pay to the order of ourselves, in London, forty-four hundred and seventeen pounds, 14s. 11d. st'g, value received, and charge the same to account of 1,058 bales cotton per 'Wind-sor Castle.'

"Your obedient servants,

"Pr. pro JAMES REID & Co.,

"WM. MOULT, JR.

"To HY. GORE BOOTH, ESQ., Liverpool.

"*Acceptance across the face of the bill.*

"*Seventh October, 1850.* Accepted for two thousand five hundred and seventy-one pounds eighteen shillings and seven pence, being balance unaccepted for acpt. 1,058 bf. cotton, pr. Windsor Castle, payable at Glyn and Co.

"Pr. pro HENRY GORE BOOTH,

"AND. E. BYRNE.

"Due 9 Decem.

"Indorsed:

"Pay Messrs. A. Dennistoun and Co., or order,

"Pr. pro JAMES REID AND CO.,

"WM. MOULT, JR."

After reading this bill, with its indorsements, the plaintiff offered in evidence a regular protest, indorsed on a copy of a bill agreeing in every particular with the above, except that for "And. E. Byrne" was written "Chas. Byrne."

The defendant objected to the reading of the protest in evidence, because it did not describe the bill of exchange produced by the plaintiffs, but a different bill. The court sustained this objection, and excluded the protest from the jury, which is the subject of the first bill of exceptions.

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form "a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is, therefore, protested."

A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed *verbatim*. 1 Pardess. 444; Chitty on Bills, 458.

However stringent the law concerning mercantile paper, with regard to protest, demand, and notice, may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust, or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made.

The copy of the bill is connected with the instrument certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original. Mercantile paper

is generally brief, and without the verbiage which extends and enlarges more formal legal instruments. Hence, it is much easier to give a literal copy of such bills, than to attempt to identify them by any abbreviation or description. The amount, the date, the parties, and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters, or even words, when the substance is retained, cannot and ought not to vitiate the protest. A lost bill may be protested, when the notary has been furnished with a sufficient description, as to date, amount, parties, &c., to identify it.

In indictments for forgery, it is not sufficient to state the "substance and effect" of the instrument; it must be laid according to the "tenor," or exact letter; but the law merchant demands no such stringency of construction. The sharp criticism indulged when the life of a prisoner is in jeopardy cannot be allowed for the purpose of eluding the payment of just debts.

It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers. The object of notice is to inform the party to whom it is sent that payment has been refused by the maker, and that he is held liable. Hence such a description of the note as will give sufficient information to identify it, is all that is necessary. What was said by Mr. Justice Story, in delivering the opinion of this court, in *Mills v. The Bank of the United States*, with regard to variances and mistakes in notices, will equally apply to protests: "It cannot be for a moment maintained that every variance, however immaterial, is fatal. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility."

In the case before us, the protest had an accurate copy of every material fact which could identify the bill—the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; in fine, every thing necessary to identify the bill. The only variance is a mistake in copying or deciphering the abbreviations and flourishes with which the Christian name of the acceptor's agent is enveloped. The abbreviation of "And." has been mistaken for Chas., and the middle letter E. omitted. The omission of the middle letter would not vitiate a declaration or

indictment. Nor could the mistake mislead any person as to the identity of the instrument described.

We are of opinion, therefore, that the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court.

This renders it unnecessary for us to notice the offer of testimony to prove the identity, which was also overruled by the court.

The judgment of the Circuit Court is reversed, and venire de novo awarded.

SECTION X—NOTICE OF DISHONOR.

FORM OF THE NOTICE.

§ 98.

Mills v. Bank of the United States (1826), 11 Wheat. (24 U. S.) 431,

This cause was argued by *Mr. Wright*, for the plaintiff in error, and by *Mr. Webster*, for the defendants in error.

Mr. Justice STORY delivered the opinion of the court.

This is a suit originally brought in the Circuit Court of Ohio, by the Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for \$3,600, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of *non assumpsit*, upon which issue was joined, and upon the trial, the jury returned a verdict for the Bank of the United States for \$4,641; upon which judgment was rendered in their favor. At the trial a bill of exceptions was taken by Mills, for the consideration of the matter of which the present writ of error has been brought to this court.

By the bill of exceptions it appears that the evidence offered by the plaintiffs in support of the action "was, by consent of counsel, permitted to go to the jury, saving all exceptions to its competence and admissibility, which the counsel for the defendant reserved the right to insist in claiming the instructions of the court to the jury on the whole case."

The plaintiffs offered in evidence a promissory note signed Wood & Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair and Horace Reed, as successive indorsers, which note, with the indorsements thereon, is as follows, to wit: "Chillicothe, 20th of July, 1819. \$3,600. Sixty days after date I promise to pay to Peter Mills, or order, at the office of discount and deposit of the Bank of the United States, at Chillicothe, three thousand six hundred dollars, for value received. Wood & Ebert." Indorsed: "Pay to A. Adair or order, Peter Mills." "Pay to Horace Reed or order. A. Adair." "Pay to the President, Directors and Company of the Bank of the United States, or order. Horace Reed." On the upper right hand corner of the note is also indorsed: "3185. Wood & Ebert, \$3,600, Sep. 18, '21." It was proven that this note had been sent to the office at Chillicothe to renew a note which had been five or six times previously renewed by the same parties. It was proven by the deposition of Levin Belt, Esq., mayor of the town of Chillicothe, that on the 22d day of September, 1819, immediately after the commencement of the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note, but there was no person there ready or willing to pay the same, and the said note was not paid, in consequence of which the said deponent immediately protested the said note for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately on the same day deposited one of said notices in the postoffice, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy: "Chillicothe, 22d of September, 1819. Sir, you will hereby take notice that a note drawn by Wood & Ebert, dated 20th day of September, 1819, for \$3,600, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chillicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you. Yours, respectfully, Levin Belt, mayor of Chillicothe." (Peter Mills, Esq.) It was further proven by the plaintiffs that it had been the custom of the banks in Chillicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange on the day after the last day of grace (that is, on the 64th day); that the branch bank, on its establishment at Chillicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place ever since. No evidence

was given of the handwriting of either of the indorsers. The court charged the jury, (1) that the notice being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that a demand had been made at the bank when the note was due. (2) That if the jury find that there was no other note payable in the office at Chillicothe, drawn by Wood & Ebert, and indorsed by defendant, except the note in controversy, the mistake in the date of the note made by the notary in the notice given to that defendant does not impair the liability of the said defendant, and the plaintiffs have a right to recover. (3) That should the jury find that the usage of banks, and of the office of discount and deposit in Chillicothe, was to make demand of payment, and to protest and give notice on the 64th day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the court to instruct the jury "that before the common principles of the law relating to the demand and notice necessary to charge the indorser can be varied by a usage and custom of the plaintiffs, the jury must be satisfied that the defendant had personal knowledge of the usage or custom at the time he indorsed the note; and also, that before the plaintiffs can recover as the holder or indorser of a promissory note, they must prove their title to the proceeds by evidence of the indorsement on the note," which instructions were refused by the court.

Upon this posture of the case, no questions arise for determination here, except such as grow out of the charge of the court, or the instructions refused on the prayer of the defendant's (Mills') counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

The first point is, whether the notice sent to the defendant at Chillicothe was sufficient to charge him as indorser. The court was of opinion that it was sufficient, if there was no other note payable in the office at Chillicothe, drawn by Wood & Ebert, and indorsed by the defendant.

It is contended that this opinion is erroneous, because the notice was fatally defective by reason of its not stating who was the holder, by reason of its misdescription of the date of the note, and by reason of its not stating that a demand had been made at the bank when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct; and no

authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser who is the holder, as he is equally bound by the notice, whomsoever he may be, and it is time enough for him to ascertain the true title of the holder when he is called upon for payment.

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights, or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the parties, the time and place of payment, and the indorsement, were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed that on the 22d of September, a note indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good if there was no other note payable in the office at Chillicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?

The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal,

practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment.

Upon the point, then, of notice, we think there is no error in the opinion of the Circuit Court.

Another question is, whether the usage and custom of the bank not to make demand of payment until the fourth day of grace, bound the defendant, unless he had personal knowledge of that usage and custom. There is no doubt that, according to the general rules of law, demand of payment ought to be made on the third day, and that it is too late if made on the fourth day of grace. But it has been decided by this court, upon full consideration and argument, in the case of *Renner v. The Bank of Columbia* (9 Wheat. Rep., 582), that where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms a part of the law of such contract, at least so far as to bind their rights. In the present case, the court is called upon to take one step farther; and upon the principles and reasoning of the former case, it has come to the conclusion that when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not. In the case of such a note, the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

Another question propounded by the defendant is, whether the plaintiffs were entitled to recover without establishing their title to the note, as holders by proof of the indorsements. There is no doubt that, by the general rule of law, such proof is indispensable on the part of the plaintiffs, unless it is waived by the other side. But in all such cases the defendant may waive a rule introduced for his benefit; and such waiver may be implied for circumstances as well as expressly given. It is in this view that the rule of the Circuit Court of Ohio of 1819, which has been referred to at the bar, deserves consideration. That rule declares, "that hereafter, in any actions brought upon bond, bill, or note, it shall not be necessary for the plaintiffs on trial to prove the execution of the bond, bill or note, unless the defendant shall have filed with his plea an affidavit, that such bond, bill or note, was not executed by him." We think the present case falls completely within the purview of this rule. Its object was to prevent unnecessary expense and useless delays upon objections at trials, which were

frivolous and unconnected with the merits. If the rule attempted to interfere with or control the rules of evidence, it certainly could not be supported. But it attempts no such thing. It does not deny to the party the right to demand proof of the execution or indorsement of the note at the trial; but it requires him, in effect, to give notice by affidavit, accompanying the plea, that he means to contest that fact under the issue. If the party gives no such notice, and files no such affidavit, it is on his own part a waiver of the right to contest the fact, or rather an admission that he does not mean to contest it. We see no hardships in such a rule. It subserves the purposes of justice, and prevents the accumulation of costs. It follows out, in an exemplary manner, that injunction of the judiciary act of the 2d of March, 1793, ch. 22, which requires the court of the United States "to regulate the practice thereof, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." As no affidavit accompanied the plea of the defendant in the present case, he had no right to insist upon the proof of the indorsements.

Another objection now urged against the judgment is, that the count demands \$3,600 only, and the jury gave damages amounting to \$4,641. But there is no error in this proceeding, since the *ad damnum* is for a larger sum. In all cases where interest, not stipulated for by the terms of the contract, is given by way of damages, the sum demanded in the declaration is less than the sum for which judgment is rendered. The plaintiffs may not recover more, as principal, than the sum demanded as such in the declaration; but the jury have a right to add interest, by way of damages for the delay.

Some other objections have been suggested at the bar, such as, that the jury had no right, without evidence, to presume that there was no other note of Wood & Ebert, in order to help the misdescription; and that the case proved was of several liabilities of the defendants which would not support a declaration on a joint contract. These questions have been fully argued by counsel, but are not presented by the record in such a shape as to enable the court to take cognizance of them.

Upon the whole, it is the opinion of the court that the judgment ought to be affirmed with costs.

BY WHOM NOTICE GIVEN.

§ 92.

Lysaght v. Bryant (1850), 9 Common Bench 46, (67 E. C. L.)

Assumpsit. Defendant drew a bill of exchange to his own order, endorsed it to James Lysaght and William Smithett, who endorsed it to the plaintiff, Admiral Lysaght, father of James. James, however, retained the bill as his father's agent and presented it for payment at maturity. Upon payment being refused Lysaght & Smithett gave defendant notice in their firm name.^b Verdict for the plaintiff, and defendant moved for a rule nisi to enter the verdict for the defendant.

MAULE, J.—I am of opinion that the notice of dishonour that was given in this case, was sufficient. Lysaght the younger appears to have acted as the agent of his father, the plaintiff. In that character, he received the bill from Lysaght & Smithett, by whom it was sworn to have been endorsed before it became due; and Lysaght the younger proved that it had ever since been kept by him amongst the documents which were held by him for his father. It was undoubtedly his duty to see that his father should have all proper remedies upon the bill. The bill, it seems, was presented on the day it became due, and was dishonoured; and due notice of dishonour was given by Lysaght & Smithett to the defendant, as drawer. Lysaght the younger having due notice of the dishonour, which operated as a notice to Lysaght & Smithett, it was clearly competent to the latter, according to the decided cases, to give notice to all prior parties to the bill; and a notice so given would enure as a notice by the party who had given notice to them. I therefore think the defendant has had a sufficient notice of dishonour. Then, as to the other point,—there was evidence on both sides. It was for the jury to say whether the plaintiff's witness was perjured or the defendant's mistaken. The former stated positively that the endorsement was made before the bill became due; the latter, not professing to have any special recollection on the subject, merely stated that it was the usual course of his office to copy all endorsements into the book which he produced, and that no such endorsement was entered therein. I think it is impossible for us to say that the jury, in giving credit to the positive statement, rather than to the inference arising from the statement, on the other side, came to a wrong conclusion.

CRESSWELL, J.—I am of the same opinion. Two questions arose in this case—first, whether the defendant had received a sufficient notice of dishonour,—secondly, whether Lysaght & Smithett endorsed the bill before it became due. The decision of the first question depends in some degree upon the second; because, whether the notice was sufficient or not, may depend upon whether there was a proper endorsement. Mere writing on the back of the bill is not enough to constitute an endorsement; there must be a delivery, or something equivalent to a delivery, of the bill to the endorsee. Here, the fact has been disposed of by the jury; and I think there was evidence enough to justify the conclusion they came to. James Lysaght swore positively that the bill was endorsed in the name, and with the concurrence of the firm, in July or August; and he further stated, that ever since the endorsement, it had been kept by him, as his father's agent, apart from the securities of the firm. That being so, it seems, from the cases, that the holder of a bill may avail himself of a notice of dishonour given in due time by a prior endorsee, provided he himself is in a condition to sue the party by whom the notice was given. Here, Lysaght the younger, holding the bill as his father's agent, duly presented it, and had it returned to him dishonoured. Notice of that fact to him, therefore, operating as notice to the firm, the present plaintiff was entitled to sue them, and, consequently, is in a condition to avail himself of the notice of dishonour given by them to the defendant.

WILLIAMS, J.—I am of the same opinion. The evidence established the whole case, if the jury were right in the conclusion to which they came: and I am not prepared to say that they were wrong.

WILDE, C. J.—I certainly was not dissatisfied with the verdict. Lysaght the younger swore positively that the security in question was appropriated by him, with Smithett's assent, in part discharge of the debt due to the plaintiff. He was very strictly cross-examined as to the period at which the endorsement took place: he distinctly swore that it was before the bill became due: he *believed* it was in July or August. If Lysaght & Smithett intended to act honestly, they were bound to make the endorsement; and there is no reason for supposing that they did not, or that James Lysaght stated that which was untrue. On the other hand, there can be as little doubt that the notary's clerk meant correctly to copy the endorsements into the book. It was for the jury to decide between the conflicting statements. As to the notice of

dishonour, the case seems to fall within the authorities. The facts show that Lysaght & Smithett had due notice of the dishonour of the bill,—one of them having caused it to be presented, and having had it returned to him. A notice, therefore, by Lysaght & Smithett, then being under a liability to the present plaintiff, according to the authorities, enures as a notice to the defendant.

Rule refused.

NOTICE BY AGENT.

§§ 92, 93.

Traders' Nat. Bank v. Jones (1905), 104 App. Div. 433, 93 N. Y. Supp. 768.

Appeal from Trial Term, New York county.

Action by the Traders' National Bank against Frank Cazenove Jones. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Argued before VAN BRUNT, P. J., and McLAUGHLIN, PATTERSON, INGRAHAM, and LAUGHLIN, JJ.

James H. Warner, for appellant.

Grant C. Fox, for respondent.

LAUGHLIN, J. The action is brought to recover of the defendant, as indorser, the amount of two promissory notes and protest fees. The question presented for determination is whether the evidence shows as matter of law the giving of due notice of protest to the defendant. Both notes were made at Scranton, Pa., by the copartnership firm of C. F. Beckwith & Co., of that city. They were payable to the order of the defendant, indorsed by him, and then indorsed by the makers and delivered to the plaintiff before maturity, at whose bank they were payable. The notary who protested the notes was called by the plaintiff. His testimony is sufficient to show due presentation, demand, dishonor, and protest, but concerning the mailing of the notice of protest to the defendant it was indefinite and uncertain both as to time and address, and conflicted with other evidence presented by the plaintiff. He testified that he addressed the notice to the defendant at some place, the number he could not remember, between 60 and 70 Central Park West, city of New York, and that he obtained the defendant's address from C. F. Beckwith, one of the makers; but he does not expressly state that he addressed the envelope according to the address he received from

Beckwith. Beckwith was also called by the plaintiff, and gave the defendant's residence, place of business, and other addresses for receiving mail at that time, none of which, however, was Central Park West; and further testified that the defendant had had an apartment in Central Park West, but does not specify the time or place. He was not asked concerning the address that he gave the notary. Beckwith testified that the defendant was a member of his firm. It may be that the jury would have been justified in finding that the notary addressed the notice to an address given by Beckwith, the defendant's partner, and that this would be a full compliance with the duty of exercising proper diligence to ascertain the postoffice address and notify the indorser of the dishonor of the paper, which is a condition precedent to his liability. (*Spencer v. Bank of Salina*, 3 Hill, 520; *University Press v. Williams*, 48 App. Div. 188, 62 N. Y. Supp. 986; *Requa v. Collins*, 51 N. Y. 144; *Gawtry v. Doane*, id. 84, 92). The court, however, was not warranted in attempting to reconcile this conflict of testimony and in deciding the question as one of law. The verdict, therefore, cannot be sustained upon the direct notice to the defendant. The notary gave due and timely notice of protest to the defendant's firm, who were both makers, and in form, at least, subsequent indorsers. If the plaintiff had alleged that the defendant was a member of the firm, I am of opinion that he would be chargeable with knowledge of the dishonor and with the notice given to his firm as indorsers (*Gowan v. Jackson*, 20 Johns. 176; *Halliday v. McDougall*, 22 Wend. 264, 272. See, also, Negotiable Instruments Law, Laws 1897, p. 739, c. 612, §§ 170, 185, 186); but this was not pleaded, and, since it was not an issue, there is no justice or propriety in seizing upon this item of evidence, although admitted without objection that it was not pleaded, for the purpose of holding the defendant. The verdict should stand or fall upon the issues as tried. The notice to the firm, however, was received either on the day the note fell due or on the morning of the day following. With it came, under separate cover, addressed to the defendant, care of the firm, a formal notice of protest by the notary in behalf of the plaintiff directed to the defendant, and the firm were requested to forward the same to him. Mr. Beckwith testified that immediately upon receiving this notice he inclosed it in an envelope and addressed it to the defendant at his regular place for receiving mail in the city of New York, which was in care of his counsel on this appeal. The notary, who was a member of the bar of Pennsylvania, testified that the statutory law of that state required

that the notice of protest to an indorser, when served by mail, be addressed either to his residence or place of business, or last place of residence. If this testimony is to be construed literally, it indicates that the rule in Pennsylvania is more restricted than the requirements of the law merchant or of the negotiable instruments law as adopted in this and many other states, including Pennsylvania (Act of Assembly of Pennsylvania No. 162, 1901 [P. L. 194]), in that under them, if the indorser has not designated an address on the instrument, notice to any address where he is accustomed to receive mail would be sufficient. (*Ransom v. Mack*, 2 Hill, 587, 38 Am. Dec. 602; *Van Vechten v. Pruyn*, 13 N. Y. 549, 555). This question would not have arisen had the plaintiff's counsel introduced the statute, instead of taking the opinion of the notary, which was manifestly not only erroneous on the law, but, as he construed the law, it is doubtful whether the notice would be sufficient. We think that the verdict may be saved, however, upon the theory that this evidence was incompetent to prove statutory law (Code Civ. Proc., § 942; *Hynes v. McDermott*, 82 N. Y. 41, 54, 37 Am. Rep. 538; *Lincoln v. Battelle*, 6 Wend. 475; *Chanoine v. Fowler*, 3 Wend. 173); and, even if the plaintiff, having introduced it, is bound by it, it is insufficient to establish that the law of Pennsylvania on this point is different from the law merchant, and should be so construed as to be consistent therewith.

Although it presumptively appears from the face of the notes and the indorsements that the defendant was an accommodation indorser for the makers (*Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Nat. Bank v. German American M. W. Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673), and therefore would not be liable to them, and consequently they could not, in their own behalf, give him a valid notice of protest (Negotiable Instrument Law, Laws 1897, p. 739, c. 612, § 161; *Cabot Bank v. Warner*, 92 Mass. 522; *Harrison v. Roscoe*, 15 M. & W. 231; *Stanton v. Blossom*, 14 Mass. 116, 120, 7 Am. Dec. 198; Story on Promissory Notes, § 303 [7th Ed.]), yet they could on behalf of the bank, and as its agents, give the notice by forwarding it immediately, as was done (Negotiable Instruments Law, Laws 1897, p. 739, c. 612, §§ 162, 163; *Sewall v. Miller*, 16 N. Y. 235; *Smith v. Poillon*, 87 N. Y. 590, 41 Am. Rep. 402; *Eagle Bank v. Hathaway*, 46 Mass. 212; *Rowe v. Tipler*, 13 C. B. 249; *Chapman v. Keane*, 3 Adol. & L. 193; *Lysaght v. Bryant*, 19 L. J. C. P. 160).

It follows, therefore, that the judgment and order should be affirmed, with costs. All concur, except Van Brunt, P. J., who dissents.

NOTICE TO WHOM.

§ 91.

Linn et al. v. Horton, imp. (1863), 17 Wis. 157.

Appeal from the Circuit Court for Rock county.

Yates and Gray, for value, gave their note, indorsed for them by Horton before delivery, and payable to the plaintiffs or order at the Rock County Bank, at Janesville, in this state. Before the note became due, the plaintiffs, who were merchants in the city of New York, indorsed it for collection to Kissam & Taylor, bankers in the same city, who indorsed it and sent it for collection to the Central Bank of Wisconsin, at Janesville. Default having been made in its payment when due, to wit, November 22, 1861, it was duly protested, and on the same day the note and notice of protest for Horton, and like notices for Kissam & Taylor and the plaintiffs respectively, were enclosed in an envelope and deposited in the postoffice at Janesville, postpaid, directed to Kissam & Taylor, who received the same November 27. On the same day Kissam & Taylor delivered to the plaintiffs the notices addressed to them and to Horton respectively; and the plaintiffs, on the same day, enclosed the notice to Horton in an envelope directed to him at Janesville, and deposited the same postpaid, in the postoffice at New York; but the notice was never, in fact, received by Horton. This action was brought against Horton together with the makers; but the Circuit Court found that "the notary who protested the note did not use due diligence to ascertain the residence of Horton," and thereupon held that proper steps had been not taken to charge him, and rendered judgment in his favor; from which the plaintiffs appealed.

Conger & Hawes, for appellants.

Charles G. Williams, for respondent.

By the court, DIXON, C. J. It is an established principle of mercantile law, that if the holder of a bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given, in due time, by the other parties, it will enure to the benefit of the holder, and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. (1 Parsons on Bills and Notes, 503, 504; and Edwards on Bills and Notes, 473, 474, and the cases cited). And

it is no objection to such notice that it is not in fact received so soon by the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he receives it. (*Colt v. Noble*, 5 Mass., 167; *Mead v. Engs.*, 5 Cow., 303; *Howard v. Ives*, 1 Hill, 263). And the same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next. (*Howard v. Ives*, and the authorities cited).

For the purpose of receiving and transmitting notices, those who hold at the time of protest, and those who indorse as mere agents to collect, are regarded as real parties to the bill or note; the former as holders in fact, and the latter as actual indorsers for value. (*Mead v. Engs.*; *Howard v. Ives*).

It follows from these principles, that the proper steps were taken to charge the defendant Horton as indorser. Notice for him was forwarded by mail, postpaid, on the day of the protest, to the agents and last indorsers in New York, and delivered by them, on the day it was received, to the plaintiffs, their immediate indorsers, who, on the same day, deposited it, inclosed in an envelope postpaid, in the postoffice at New York, directed to the defendant at Janesville, Wisconsin, his proper postoffice.

Under these circumstances, the only question which can possibly arise is, whether the defendant ought to be discharged by reason of the notice not having been in fact received by him. He testified that it was not. Professor Parsons observes, that in all the cases of constructive notices, where notice given by a subsequent to a prior indorser has been held to enure to the benefit of the immediate indorser, it has appeared that the notice was actually received; and he raises a question whether this would be so if the notice was sent to the wrong place. (1 Pars. on Notes and Bills, 504, note, and 627). But here the notice was sent to the *right* place. Besides, the plaintiffs, who seek to avail themselves of the notice, are the indorsers who sent it to the defendant as the indorser next immediately preceding them. We have already seen that the rule of diligence as to them is the same as in the case of the holder.

Let the judgment be reversed, and the cause remanded with directions to enter judgment in favor of the plaintiffs according to the demand of the complaint.

NOTICE BY INUREMENT.

§ 94-95.

Lysaght v. Bryant. (See page 413.)

NOTICE TO PARTNERS.

§ 101.

Fourth Nat. Bank v. Heuschen. (See page 365.)

NOTICE TO BANKRUPT.

§ 103.

Am. Nat. Bank v. Junk Bros (1895), 94 Tenn. 624.

Appeal from Chancery Court of Davidson county. ANDREW ALLISON, Ch.

J. M. Gaut and J. S. Pilcher, for Bank.

A. N. Grisham, for Junk Bros.

BEARD, J. This suit was instituted against the Junk Bros. Lumber & Manufacturing Co., a corporation with its situs in Nashville, as the indorser for value of certain domestic negotiable notes. The defendant resisted recovery on the ground that notice of dishonor of the paper was not given as the law requires. A decree having been pronounced against the corporation, it has filed the record in this court, and the action of the court below in overruling this defense is assigned as error.

Before coming to the general question raised by the assignments, it is proper to dispose of five of these notes, which are shown by the proof to have been made for the accommodation of this corporation and afterwards indorsed by it to the complainant. As to these notes, their makers stood in the situation of sureties to the indorser, and it was the latter's duty to provide funds to meet them at maturity, and it was, therefore, bound to the holder without presentment, protest, or notice. (2 Am. & Eng. Ency. of Law, 399; 2 Daniel on Nego. Ins., Sec. 1085; 3 Randolph on Com. Paper, Sec. 1205; *Black v. Fizer*, 10 Heis., 48). Thus disposing of those five notes, the question recurs as to the liability of the defendant as indorser of the remaining thirty-five.

The facts disclosed in the record are, that, for a considerable period of time, the Junk Bros. Lumber & Manufacturing Co. were engaged in manufacturing in Nashville, with its business

office located at the corner of First and Woodland streets, in that city. Its books were kept there and there its mail, with that of its principal officers and its various employes, was delivered. On May 28, 1892, the corporation being insolvent, made a general assignment of all its property, both real and personal, to one Stainback, as assignee, for the benefit of all its creditors. This assignment was a full surrender to the assignee, and, by its terms, "vested him with all power and authority to do all acts and things which may be necessary in the premises to the full extent of the trust" created, and it authorized him "to ask, demand, recover and receive of and from all and every person or persons, all property, debts, and demands due, owing, and belonging to" said assignee, and "to give acquittances and discharges for the same, to execute and deliver deeds," and to use the name of the assignor whenever the purpose of the trust required.

Immediately on the execution of the assignment, the assignee took charge of the property covered by it, and went into possession of the office of the corporation, with its books, iron safe, etc., and employed at this office a young man to do such clerical work as was required in the administration of the trust. For a limited time after the day of the appointment, with the old employes of the corporation, he continued to run its machinery for the purpose of converting its raw material into manufactured goods. In winding up the affairs of this trust, he took into his service, as such assignee, one Spain, who was a stockholder as well as the director and general manager of this corporation at the date of the assignment, and who continued, according to the testimony in the case, to sustain these relations to it after that date. It is true the duties imposed by the assignee upon Spain made it necessary for him to be principally in the yard and about the plant, but the proof is, that he was in this office every day, and sometimes more than once during the day. The mail of the corporation was delivered there as before, and, assuming to be entitled to the control of it, the assignee opened it personally or by his clerk, and gave it such attention as it required, and no officer of the corporation ever called in question his right to control it, although, in the nature of things, all the officers must have known that he was receiving it and so dealing with it.

After the assignment the corporation abandoned business, and all of its executive officers (with the single exception of the general manager) were scattered, and each one pursued his own private affairs at other points in the city of Nashville. After that time it had no other office, and there were but two meetings of

the board of directors, and these were held in private offices, and with regard to past and unimportant transactions. Beginning with the date of the assignment, and for several months thereafter, the paper sued on matured, and payment on proper demand having been refused, it was protested by a notary public, and notice of the protest in each instance, save two, was directed by him to the corporation by name, and was left by him at the office heretofore mentioned. In the two excepted cases, or instances, the notices were addressed to "George W. Stainback, Assignee of the Junk Bros. Lumber & Manufacturing Company." In all these cases, as notices were received, the clerk of the assignee entered a memorandum of the protest in the books of the corporation kept by him, and generally deposited these notices in the safe. The officers of the corporation insist that they did not receive these notices. Conceding this to be true, is the defendant bound as indorser under the foregoing facts, notwithstanding the lack of actual receipt of these notices?

Where the indorser has failed to receive notice, he is discharged unless the holder can show that he has used due diligence in his effort to communicate notice. Where this can be shown, however, it is immaterial that the notice does not reach the indorser. (*Harris v. Robinson*, 4 Howard [U. S.], 336). So it is, that legal notice is not necessarily actual notice. (*Saco National Bank v. Sanborn*, 63 Maine, 340). Thus, an indorser who changes his residence without the knowledge of the holder of the protested paper, is bound by notice sent to his former place of residence, if the holder is not guilty of negligence in his failure to have knowledge of the change. In such a case the holder, in the absence of any fact to put him on inquiry, can well assume that the indorser's residence continues where it formerly was. He is not bound to go upon the street to ascertain a fact which he has the right to assume he already knows. (*Saco National Bank v. Sanborn*, *supra*; *Bank of Utica v. Phillips*, 3 Wend., 408; *Requa v. Collins*, 51 N. Y., 148; 2 Daniel on Neg. Inst., Sec. 1083; 3 Randolph on Com. Paper, Sec. 1281; *Harris v. Memphis Bank*, 4 Hum., 518).

The well-established rule is that, where personal notice is not given, the notice must be sent to the place where the indorser will be most likely to receive it, and, if there is reasonable diligence exercised by the holder in ascertaining this place, this is all the law demands.

The Bank of America v. Shaw, 142 Mass., 290 (S. C., 7 N. E. R., 779), is, in many respects, similar to this case, and will

serve to illustrate this rule. The facts in that case were that F. Shaw & Co. had done business at 268 Purchase street, in Boston, and, while so engaged, indorsed the paper in question. Before its maturity, the firm became insolvent, and made a general assignment to one Wyman for the benefit of their creditors. The assignee took possession of the office of the firm, and used it in the administration of his trust, but he permitted the sign of the firm to remain tacked to the door. At the maturity of the paper, F. Shaw was a fugitive from Massachusetts, and in hiding in Canada. The notice of protest addressed by the notary to the firm, by its proper name, was left by him at this office. F. Shaw, when subsequently sued on this paper, defended upon the ground that this notice was not sufficient to bind him, but the court held that it was good, "because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust." It is true that, in the opinion announced, the fact of Shaw being a fugitive at the time of the notice is given its due weight by the court, but this was not, by any means, controlling in the conclusion reached.

So, in *ex parte Baker*, L. R., 4 Ch. Div., 795, the facts were, that Bellman & Co., who had done business at "Oak Brewery," but were no longer doing so, drew drafts on one Hay, which were dishonored. Before their maturity, Bellman had become bankrupt, and a trustee had been appointed for his estate. Notice of dishonor was directed to the drawers at "Oak Brewery," and, yet, in the absence of proof that the trustee was in possession of the old place of business of the firm, the notice was held to be sufficient.

Again, in *Casco National Bank v. Shaw*, 79 Maine, 376 (S. C., 10 At. Rep., 67), upon facts like those considered in *Bank v. Shaw*, *supra*, and in an action against the indorsers, the court say: "Notices were addressed to them at their former place of business, where their affairs were being settled by a trustee to whom they had made an assignment for the benefit of their creditors, and we have no doubt that the notices were received by the latter. Notices so sent and mailed are sufficient."

It is unnecessary to extend the discussion of this question. It is sufficient to say that, in view of all these authorities, we have no hesitation in holding that the corporation is liable as indorser on all this paper, where notices of protest were addressed to it in its corporate name.

But it is insisted, however, that at least the corporation is not liable on the two notes the notices of the protest of which were

addressed by the notary to "G. W. Stainback, assignee of the Junk Bros. Lumber & Manufacturing Company." Whether notice of protest to the trustee of a bankrupt's estate, or to the assignee of an insolvent assignor making a general assignment, is sufficient, has been the subject of uncertainty of opinion with some of the text writers, and of conflict among others.

Mr. Byles, in his work on Bills (Wood's Ed.), p. 294, says: "If the drawer of a bill become bankrupt, notice must, nevertheless, be given to him, whether a trustee be appointed or not." A number of English cases are cited by the author in his note to this text, some of which support it, and others do not.

Parsons says: "If a person entitled to notice be bankrupt, notice should be given to him, if the assignees are not yet appointed; if they are, notice, perhaps, should be given to them," etc. (1 Parsons on Notes and Bills, 500).

Judge Story says: "If the party entitled to notice be a bankrupt, and assignees have been appointed, and the holder knows it, notice should be given to them." (Story on Prom. Notes, Sec. 307).

Mr. Daniel says: "If the party be a bankrupt, it is best to give notice to him and to his assignee also." If, however, "given to the assignee alone, it would probably be sufficient." (2 Daniel, § 1002).

On the other hand, Mr. Chitty says: "If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and after such choice, to them." (Chitty on Bills, p. 228).

The author of the article on Bills and Notes (Mr. Charles Merrill Hough, of the New York bar) in 2 Am. & Eng. Enc. of Law, p. 412, says: "Upon the bankruptcy of an indorser, and before the appointment of an assignee, the bankrupt himself is the proper person to notify, but the assignee, when appointed, should receive all notices of dishonor."

Mr. Tiedeman says: "If the drawer or indorser be bankrupt, notice should be given to the assignee, if there be one, particularly if the party has absconded."

In one of the latest, and, perhaps the most elaborate, of the treatises on the subject of commercial paper—that of Mr. Randolph—the author says: "After the drawer or indorser of a bill has become bankrupt, notice of its dishonor must be given to him or to his assignee; * * * if an assignee has been appointed, and his appointment is known, the notice should be given to him." (3 Randolph, Sec. 1243).

Mr. Wade, in his work on "Notice," says: "When the indorser or drawer becomes bankrupt subsequent to drawing or indorsing the bill or note, the notice should be given to the assignee, when one has been selected prior to the dishonor of the instrument."

This question seems to have been considered and determined in only three of the American courts. The Supreme Court of Kentucky, in *Callahan v. Bank*, *supra*, in the case of a voluntary general assignment for the benefit of creditors, after a full and careful consideration of the authorities, announced as the law of that state, that notice to the assignee, in such an assignment, would bind the indorser and his estate, and this upon the ground that, by this act of the assignor, he was, under the assignor, in a qualified sense at least, the general representative of his indebtedness.

On the other hand, the Supreme Court of Ohio, in *House v. Vinton*, 43 Ohio St. R., 346, by a majority opinion, declined to recognize the authority of this case, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. In this latter case, however, there is a strong dissenting opinion by two of the judges of that court, in which the soundness of the rule, as announced by the Kentucky court, is earnestly insisted upon.

The case of *Casco National Bank v. Shaw*, 79 Maine, 376, is in harmony with the rule in *Callahan v. Bank*, *supra*, although the latter case is not mentioned in the opinion of the court.

This question has been heretofore undetermined in this state, and we are at liberty, therefore, to establish that rule which is most in accord with what we conceive to be the weight of authority and reason. We are satisfied, therefore, to hold the law to be that, whenever a general assignment is made, as contemplated by our law, that the assignee in such assignment so far stands in the shoes of his assignor that notice to such assignee of the non-payment of indorsed paper will bind such indorser.

The judgment of the court below is affirmed.

NOTICE BY TELEGRAPH.

§§ 98, 110-3.

Fielding v. Corry et al. (1897), 1 Q. B. D. (1898), 268.

Appeal from the judgment of Ridley, J. at the trial of the cause with a jury.

The action was by the plaintiffs as holders of a bill of exchange against several defendants, and, among others, against Mrs. Edwards, who was an indorser of the bill. The bill was put into the hands of the Cardiff branch of the County of Gloucester Bank for collection, and forwarded by that branch to the London and Westminster Bank in London, who presented it on Saturday, November 10, 1894. The bill was dishonoured; and on Monday, November 12, the London and Westminster Bank sent by post a notice of dishonour directed to the Cirencester branch of the County of Gloucester Bank. On the following day they discovered the mistake, and telegraphed notice of dishonour to the Cardiff branch. There was no evidence as to the written notice of dishonour having reached the Cardiff Bank, but on the Wednesday, which was the day on which notice of dishonour should, in due course, have been given by that branch, this was done. The subsequent notices were given in time. Ultimately the defendant, Mrs. Edwards, received notice at the time at which she would have received it had all the notices been given in order and in due time. The defence to the action was that notice was not sent to the Cardiff branch in time, and that the defendant was therefore discharged. Judgment was entered for the plaintiffs.

The defendant, Mrs. Edwards, appealed.

Woodfin, for the defendant.

Ashton Cross and *Edmondson*, for the plaintiffs.

A. L. SMITH, L.J. The question of law raised in this case is whether notice of dishonour of a bill of exchange was given in time. It appears that the plaintiffs had a bill of exchange, which they handed to the Cardiff branch of the County of Gloucester Bank, which is a banking company having branches at different places. The Cardiff branch sent the bill to their London agents, the London and Westminster Bank, by whom it was presented for payment in London on Saturday, November 10, 1894, and it came back into their hands in the afternoon, so that they had until Monday, November 12, to give notice of dishonour, and on that day they sent notice. By mistake this notice was sent to the Ciren-

cester branch of the County of Gloucester Bank, and not to the Cardiff branch. On the morning of Tuesday, November 13, the London bankers had discovered the mistake, and they telegraphed to the Cardiff branch, giving them notice that the bill was dishonoured. What happened after this was that due notice was given in succession by the Cardiff branch, and then all the way down the line of indorsers till the defendant, who now appeals, was reached, though she got notice of dishonour in due time. The question raised is whether there was a blot in the proceedings by reason of notice not having been given on Monday the 12th to the Cardiff branch; the notice having, as I have said, been misdirected to the Cirencester branch. To ascertain this we must refer to the Bills of Exchange Act, 1882, s. 49. By sub-s. 5 the notice may be given in writing or by personal communication, and in any terms which sufficiently identify the bill and intimate that it has been dishonoured by non-acceptance or non-payment, and I refer to this for the purpose of shewing that there is no magic about a notice of dishonour, but that it may be sent by post or in any other way. Then, by sub-s. 12, the notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. It is further provided that in the absence of special circumstances—and I think there were no special circumstances proved in this case—notice is not to have been deemed to have been given within a reasonable time unless, “where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day; and if there be no such post on that day, then by the next post thereafter.” Speaking for myself, I think that the notice would be good if on the day after the dishonour of a bill the person giving the notice were to telegraph to the person to receive the notice in terms which sufficiently identified the bill and intimated that it had been dishonoured. It appears that the London and Westminster Bank gave what would be a proper notice of dishonour to the County of Gloucester Bank, though by mistake the notice was addressed to the wrong branch of that bank. It seems to me that we would be frittering away the provisions of the statute if we were to hold that a mistake in an address could not be rectified, if the effect of the rectification is that the person to whom notice is sent in point of fact gets notice in due course and in due time. It is said that the sending of the notice and the sending of the telegram were disjunctive acts, and that, the notice of Monday being sent to the wrong place and the telegram

of Tuesday being too late, no proper notice has been proved. I cannot bring myself to disconnect these two acts, and, although the written notice of Monday is not shewn to have been properly directed, I think the mistake was rectified in due time by the telegram of the next day. I think, therefore, that the appeal should be dismissed.

RIGBY, L.J. I am of the same opinion. A notice of dishonour is not required to be in any particular form—it may be by writing or by personal communication, and may be in any terms provided it gives the necessary information. It was plainly intended to give the widest discretion as to the form of the notice. If there were anything in the act which declared that the address of the person who is to receive the notice is material, different considerations would arise. For my part, I think it is not material that the notice has been wrongly addressed, provided that this has not prevented it getting to the proper person within the proper time.

With regard to the facts of this case, I agree that there are no special circumstances to be considered. The notice has been sent to the County of Gloucester Bank at one of their many addresses, and received there and acted upon without objection, and the question is whether it was sent to them in time. With regard to the giving of notice, agents are treated successively as if they were holders. Can it be said that if the County of Gloucester had themselves been indorsers they would not have been liable had the notice come in an irregular manner into their hands but in proper time? If this cannot be said, I do not think the notice should be held to be ineffectual in a case in which the bank are not parties to the bill. In fact, the Cardiff branch knew of the dishonour of the bill on Tuesday, November 13, in time to give notice on the proper date—the 14th. To hold that notice directed to the right person but sent to a wrong address must necessarily be invalid would be to go to an extreme length, and make it appear that a right address is an essential part of the notice. There may be no address, or the address would not be material if a person carrying the notice with a wrong address met the person to whom it was directed and delivered it to him.

I think the notice was sufficient whether the Cardiff branch is treated as separate from and independent of the Cirencester branch or not. The latter bank received due notice on the 13th, and the Cardiff branch knew of the dishonour of the bill and of the notice on the same day, and by reason of the action of the Cirencester branch were enabled to do exactly what was necessary. Notice of dishonour reached the defendant at the proper

time, and what was done was precisely what is required by the statute. Under these circumstances it seems to me impossible to say that there was a failure in one of the links of the chain of notices; and if so it follows that the plaintiffs are entitled to retain the judgment in their favour.

COLLINS, L.J. I have the misfortune to differ from the other members of the court on a point in this case which is of importance, and the conclusion I have come to is that the appeal should be allowed.

In the case of a bill of exchange any one who is entitled to notice of dishonor may rely on a prior breach by any one of the persons required to give notice. This is established by the cases, and was not disputed in the argument. Another general observation is that the requirements as to notice of dishonour are arbitrary and highly technical, but they have long been settled by authority, and are now crystallized into statutory rules. It was long ago held that knowledge is not equivalent to receipt of notice: see *Caunt v. Thompson*, 1849, 7 C. B. 400. It would unsettle the practice of merchants if these rules were not strictly observed.

The point on which I differ is the question whether different branches of a bank are to be treated as one and the same person for the purpose of giving and receiving notice of dishonour. I think the judgments that have been given involve the proposition that they may be treated as one. I am clearly of opinion that they cannot. The point was decided in *Clode v. Bayley*, 12 M. & W. 51; 13 L. J. (Ex.) 17, more than fifty years ago, in which case it was treated as resting on long-established practice. In *Prince v. Oriental Bank Corporation*, (1878) 3 App. Cas. 325, Sir Montague Smith in delivering the judgment of the Privy Council refers with approval to *Clode v. Bayley*. He says, speaking of that case: "It was held that for the purpose of estimating the time at which notice of dishonour should be given, the different branches were for that purpose to be regarded as distinct. In considering whether notice of dishonour was given in time, it was thought reasonable that the bill should be sent successively to the branch banks through which it had come to the principal bank, before giving the notice. It was pointed out by Lord Abinger that it was not possible for the bank in London to know from whom the bill came; therefore it was necessary, in the ordinary course of the transaction of business, that it should be sent to the branches before notice of dishonour could properly be given." In *Clode v. Bayley*, there was an indorsement of the bill to

one of the branch banks; but that fact does not affect the principle upon which the decision is based, and, indeed, as between two of the branches, there was no indorsement. In the course of the argument in that case it was said: "The only question is, whether, this bank having two subordinate branches, each of the three establishments is to be considered as a separate holder, and entitled to notice of dishonour, or whether it is not to be considered as one and the same establishment." That seems to me to be the point before us, and the submission that the bank and its branches were to be considered as one establishment was unsuccessful. In *Bray v. Hadwen*, (1816) 5 M. & S. 68, the banker was held to be entitled to one whole day for the purpose of giving notice, as in the case of an ordinary person into whose hands a dishonoured bill comes.

Under s. 49, sub-s. 8, of the Bills of Exchange Act, 1882, "where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf." In this case the London and Westminster Bank was agent to present the bill, and had no other principal for the purpose of giving notice of dishonour but the Cardiff branch from which the bill was received; but they sent notice to a branch to which they were not responsible. Such a notice, in my opinion, is ineffective, and must be put out of consideration. If it were not so, it would follow that notice to one branch of a bank would be notice to all branches, and this even though a branch might be in a remote part of the kingdom, or, for anything I know, out of the kingdom.

It has been contended that the London and Westminster Bank sent notice on the 12th, because on that day they posted one to the County of Gloucester Bank at their Cirencester branch; but on the authorities I have cited this was not notice to the Cardiff branch. It is said to have been a notice sent to the right person at a wrong address. That, in my judgment, would not make it a better notice than if it had been sent to the wrong person. In fact, it was not sent to the right person; it was sent to the Cirencester branch, which, for this purpose, was the wrong person, and there is no evidence that it ever reached the Cardiff branch. This notice, therefore, may be wiped out of the discussion. It has been sought to eke out this defective notice by means of the telegram which was sent to the Cardiff branch on the following day; but, within the terms of the section, that telegram was clearly not in itself a good notice; and to this my learned brothers agree. How does it become any better from the fact

that an abortive attempt to send a good notice had been made the day before? The defendant Mrs. Edwards did, in point of fact, receive notice as soon as she would have done if there had been no break in the chain; but the cases have decided that she is nevertheless entitled to take advantage of the break. I think, therefore, that the appeal should be allowed.

Appeal dismissed.

WHERE NOTICE MUST BE SENT.

§ IIC

Bartlett et al. v. Robinson (1868), 39 N. Y. 187.

This action is brought against the defendant herein as indorser of a promissory note, dated New York, July 18, 1860, made by J. Bryant Smith, which the defendant indorsed in the following form, viz.: "Chas. Robinson, 214 E. 18th street." At the time he so indorsed the note he resided at the place so designated, and continued to reside there to the time of the trial of the action.

The note was duly presented for payment, in the city of New York where it was payable, and was protested, and on the next day the notary deposited in the postoffice in the city of New York a notice of such protest, addressed "Chas. Robinson, Esq., City of New York," and paid the postage thereon.

The notice did not reach the defendant, and he did not receive any notice of such protest.

There were at least two other persons of the name of Charles Robinson residing in the city of New York at the time of the making and at the time of the protest of the said note.

By a statute of the State of New York, passed in 1857, (Laws of 1857, ch. 416) it is provided that "whenever the residence or place of business of the indorser of a promissory note * * * shall be in the city or town, or wherever the city or town indicated under the indorsement or signature of such indorser as his or her place of residence * * * shall be the same city or town where such promissory note * * * is payable, or is legally presented for payment * * * all notices of non-payment * * * of such promissory note * * * may be served by depositing them, with the postage thereon prepaid in the postoffice of the city or town where such promissory note * * * was payable, or legally presented for payment * * * directed to the indorser * * * at such city or town.

On a trial of the action before a referee the service of notice

upon the indorser was held insufficient, and judgment was rendered for the defendant. The judgment was affirmed in the Supreme Court in General Term in the first district. The plaintiff appealed to this court.

Thomas Stevenson, for the appellant.

Wm. W. Niles, for the respondent.

WOODRUFF, J.—The condition of the liability of the indorser of a promissory note is, that if, upon due demand, the note is not paid by the maker, the holder shall give him notice thereof, in order that he may take measures for his own security or protection.

The use of due diligence, by the holder, to bring such notice home to the indorser, stands by law, in the place of actual notice, even though it be ineffectual, and fails to bring home knowledge to the indorser.

In all cases, then, in which the indorser fails to receive notice (he having done nothing to waive or dispense with it), the question of liability becomes one of diligence. Has the holder used reasonable diligence to give the indorser notice?

That is a question partly of fact and partly of law, and must be determined according to the circumstances of each case.

What will constitute reasonable diligence, in every supposable set of circumstances, cannot be decided by any unvarying rule. Certain efforts, when proved to have been made, have been passed upon by the courts, and, prior even to adjudication, been so accepted by mercantile usage and acquiescence, that they may be stated as rules for the guidance of all holders of bills, and the instruction of all indorsers, and, it will be seen, that they adapt themselves to the changes in the condition of things, and to the conveniences and necessities of business.

Thus, in the early history of the subject, it was necessary to carry the notice, or send it by some messenger, so as to be able to prove its delivery. When communication was established by regular post, under such governmental or official responsibility, that a presumption of safe carriage was warranted, and the usages of business men to take their correspondence from such officials, in due course, were recognized, then, reasonable diligence was held satisfied by the immediate dispatch of notice by the post, properly addressed, to the indorser.

So, delivery of notice, at the residence or usual place of business, is held reasonable diligence, because the habits of business, and of life, make it unreasonable to require the holder to pursue the person to whatever place he may, at the time, happen to be,

and, also, because, presumptively, and according to the ordinary experience of men, a notice so left will come to his hands.

And so, also, when the residence is unknown, then diligence, in the endeavor to find the person, or to learn his residence, or place of business, is deemed all that it is reasonable to require, and that will stand in the place of notice.

Every relaxation of the rule, that actual notice shall be given, is founded on the idea, that reasonable convenience in respect to the mode of giving the notice, and reasonable diligence in the endeavor to bring it home to the indorser, should stand instead thereof, or be deemed equivalent to actual notice; and, therefore, it shall avail to the holder whether it is effective in bringing notice home to the indorser or not.

But, immediately out of this relaxation grows another correlative right of the indorser to prescribe the place to which such notice may be sent, when he makes his indorsement. He enters into the contract, presumptively, with knowledge that he may receive personal notice, or that the notice may be sent to his residence or place of business. He knows what contingencies may happen under which notices, so left, may fail to reach him in due season. He may know of arrangements of his own, which make it important that, in order to reach him in due season, the notice should be forwarded or delivered at a particular place.

Now, it is settled that, if he designate such place, the holder may give notice at that place. This is so settled, because it is reasonable diligence on the part of the holder to deliver the notice at the place where the indorser has appointed to receive it, and because, to hold that such notice is not sufficient, is to permit the indorser to mislead the holder, and practically to defraud him.

The designation of the place by underwriting, at the time of his indorsement, is, therefore, an invitation to the holder to deliver a notice addressed to him as indorser at that place, and concludes him so that he may not deny that, for all the purposes and conditions of the indorsement, that shall be deemed his residence or place of business.

If he has actually removed, and that fact is known to the holder, another question would arise, but in the first instance it is clear that a notice at that place should be deemed sufficient to bind him.

Why then should not the obligation of the holder, who accepts an indorsement with such a designation, and the obligation of the indorser, who makes the designation, be reciprocal?

I think they are, and that such designation should be deemed a qualification of the indorsement, and import that notice shall be personal or by delivery at the place designated.

If this be so, then the decision of this case does not depend upon the particular construction of our statute of 1855, but upon a broader inquiry. Thus, before our statute, if the indorser resided in the same town or city with the party seeking to charge him, the notice must be given by actual delivery to him or at his residence or place of business; and a delivery, if not personal, would be sufficient at the place designated, and in my opinion must, in order to charge him, be delivered there.

If they did not reside in the same town or city, then a notice sent by mail—and, in order to that, deposited in the postoffice—addressed to him at the city or town in which he resides was sufficient; and, if there be more than one postoffice in the same township, then addressed to the postoffice at which the indorser usually receives his letters.

Now our statute has substituted a deposit of the notice in the postoffice, in the same city or town in which presentment for payment is made, "directed to the indorser at such city or town" for the actual carriage or sending the notice by a messenger to the residence, in certain cases and among them, "whenever the residence or place of business of such indorser shall be in such city or town."

I apprehend that all that was intended by this statute (in its bearing upon this case) is, that, in view of the perfection of our postal system and the general certainty that men of business will receive letters directed to them coming into our postoffices, such deposit of notice shall be accounted reasonable and sufficient diligence to notify an indorser as well when he resides in the same town as when he resides in another; and that the statute has no bearing whatever upon the right of the indorser to designate the place to which the notice shall be addressed, the right of the holder to act in pursuance of that designation, the binding effect of such a designation on the indorser, or the obligation of the holder who accepts an indorsement so qualified.

And, therefore, as well when the parties do not reside in the same city or town as when (according to our statute) they do, or in short whenever notice is sent by mail or deposited in the postoffice, the notice must be directed to the indorser, not only at the city or town, but to the specific place designated by the underwriting.

In our cities and large towns, where there are often many

persons of the same name, such underwriting is very important as a descriptive designation of the indorser, and not only appoints the place where the indorser desires to have the notice come, but tends to identify the person who is entitled to the benefit of the notice.

I think, therefore, that a compliance with what is said to be the letter of the statute, by writing the name of the indorser and the name of the city, is not satisfying the requirement that reasonable diligence should be used, and that a just interpretation of the statute requires that the words "directed to the indorser at such city or town" includes as a part of such "direction" conformity to the prescription which the special indorsement imports.

To the suggestion that the holder ought not to be compelled to take the risk of the handwriting of the indorser, and that if he directs the notice to the designated place, it may turn out that the indorser has no residence or place of business there and did not write nor authorize such designation, it will suffice to say that no party is bound to accept such an indorsement; he acts voluntarily in accepting the note or bill and in giving faith to the indorsement. If he takes it he necessarily assures himself (so far as he deems it necessary or prudent) of the genuineness of all the signatures on which he relies, and yet the signature of a supposed indorser may not be genuine; the holder is at that risk. So in reference to the authenticity of any qualification of the indorsement. He acts voluntarily and may rely upon it or not at his election, and ought to be bound by it.

think the judgment should be affirmed.

MASON, J., dissenting.

NOTICES TO ONE INDORSER FOR DISTRIBUTION AND DELIVERY TO
CO-INDORSERS. § 92.

Van Brunt & Sons v. Vaughn (1877), 47 Iowa, 145, 29 Am.
Rep. 468.

Appeal from Pottawattamie District Court.

Action against the indorser of commercial paper. There was a judgment in the District Court for plaintiffs; defendant appeals. The facts of the case appear in the opinion.

John H. Keatley, for appellant.

Smith & Carson, for appellees.

BECK, J. The plaintiffs, defendant, and two others, all residents of Council Bluffs, were indorsers of a draft which was protested for non-payment in Little Rock, Arkansas, where the acceptor resided, or was, at the time, doing business. Notices of non-payment to all the indorsers were sent, by the notary making the protest, through the mail, under one cover addressed to one of the indorsers at Council Bluffs. This indorser gave the notices addressed to the other indorsers to plaintiff, who deposited the notice directed to defendant in the postoffice at Council Bluffs, properly directed to him. Notice to another indorser, who is sued with defendant, was sent in the same way and was received by him. It is not shown that defendant, who alone appeals, received the notice sent him. It is now insisted by defendant that the sending of the notice to one indorser by mail and the deposit thereof, properly directed, in the postoffice by such indorser, as above stated, is not sufficient to charge the defendant as an indorser of the paper. This position presents the only question in the case.

The notary was authorized to transmit the notices to the indorsers by mail, and if they were so directed and sent that, in the usual course of the mail, defendant would have received them, it is sufficient. The notary may employ proper means and instrumentalities to secure the deposit of the notices in the postoffice. So he can use proper instrumentality, if any be necessary, to secure their transmission by the mail. If it be necessary in thus transmitting them to re-deposit them in the postoffice with new directions, so that they may reach the indorser in due time and by due course of the mail, this may be done. The mail is used in this manner as the medium of the transmission of the notices, and the instrumentalities used for the re-deposit and re-direction of the notices are but means necessary to secure the transportation of the notices by mail from the notary to the indorser.

The transmission of notices of the protest of commercial paper through a party thereto, who re-deposited them in the postoffice of the persons to whom they were directed, has been held sufficient in more than one well considered case. See *Hartford Bank v. Stedman*, 3 Conn. 489; *Eagle Bank v. Hathaway*, 5 Met. 212; *Manchester Bank v. Fellows*, 8 Foster, 302; *Warren v. Gilman*, 17 Me. 360. But a different rule was recognized in *Sheldon v. Benham*, 4 Hill, 129. The weight of authority, as well as reason, seems to support the rule we adopt. The judgment of the District Court is

Affirmed.

TIME WITHIN WHICH NOTICE MUST BE SENT. §§ 104-106.

Sussex Bank v. Baldwin. (See page 369.)

Simpson v. Turney (1844), 24 Tenn. (5 Humph.) 419, 42 Am. Dec. 443.

Gibbs, for Simpson.

H. M. Burton, for Turney.

REESE, J., delivered the opinion of the court.

The Branch Bank of the State of Tennessee was the holder of a promissory note, payable at said bank, made by James H. Jenkins, to Anthony Dibrell, and endorsed in the following order: A. Dibrell, S. Turney, and Jno. W. Simpson. Turney's residence is within one mile of the bank, at Sparta, so known to be to the bank, and to all the other parties to the note. The note was legally due on the 1st day of February, 1843, that being the third day of grace. It was on that day protested. On the 2d day of February no notice of the protest for the non-payment of the note was either served upon Turney personally or left at his residence. He had notice from the bank, the holder, on the 3d day of February. John W. Simpson, the plaintiff, the immediate endorser of Turney, gave him no notice whatever.

These facts being specially found by the jury in the case, the circuit court gave judgment for Turney, and the plaintiff has appealed in error to this court.

It is not insisted for the plaintiff here that the notice of the bank to Turney, the only notice he received, was in time. But it is urged that, if Simpson had given him notice on the day he received notice from the bank, such notice would have been good; and that is certainly so; and the plaintiff further insists that the notice given by the bank shall inure to his benefit. If the notice had been in time and valid, it would by law have inured to his benefit, he being an intermediate party. But a notice of no benefit to the bank, because not fixing the liability of the party notified, cannot inure to the benefit of another. So to hold would be to introduce a new principle into the law merchant. Suppose there were ten endorsers upon a note; if the holder, ten days after the protest, gave notice to the first endorser, this, according to the argument, would fix all the endorsers, for it would be just the time necessary to them to have given notice to each other successively.

It is, perhaps, a universal principle, where substitution exists at all, that the matter or thing to be substituted to must be valid and effective in behalf of the principal; if it be ineffectual in his behalf, it is difficult to see how it can inure to the benefit of others.

Upon the direct question raised in this case, Bailey on Bills expressly says: "Nor is it any excuse that there are several intervening parties between him who gives the notice and the defendant to whom it is given; and, if the notice had been communicated through those intervening parties, and each had taken the time the law allows, the defendant would not have had the notice the sooner."

The same principle is also decided in the case of *Turner v. Leech*, 4 Barn. and Ald. 454.

We have been referred by the plaintiff to what has been said by this court in the case of *McNeil v. Wyatt*, 3 Humph. 128. The bank, at Lagrange, in that case gave notice to one Glover, on the 14th, to be served on Wyatt & McNeil. Wyatt was served on the 14th, and McNeil on the 15th. But Glover proved in the circuit court that he was the general agent of Wyatt to serve notices for him when his name was on paper. And the circuit court left it to the jury to say whether Glover, who served the notice, was not Wyatt's agent as well as the agent of the bank; and, if he was, then the notice to McNeil on the 15th, one day after Wyatt received notice, was sufficient.

This court held that there was not any error in this part of the charge; and placing the validity of the notice, as this court did, upon that special ground, is a distinct recognition of the general principle maintained by us in this case.

Upon the whole, we affirm the judgment.

Smith v. Poillon et al. (1882), 87 N. Y. 590, 41 Am. Rep. 402.

Appeal from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 28, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial. (Reported below, 23 Hun, 528.)

The nature of the action and the material facts are stated in the opinion.

Albert A. Abbott, for appellants.

James McKeen, for respondent.

EARL, J. This action was brought to recover of the defendants as indorsers upon a promissory note, made in the city of New York by the McNeal Coal and Iron Company, February 28, 1870, payable to their order three years after date, at the office of the company.

It was alleged in the complaint that the company, a Pennsylvania corporation, had an office in the city of New York at the date of the note, and that the note was payable at such office, and these allegations were expressly admitted in the answer.

The defendants defended the action upon two grounds: (1) That the note was not properly presented for payment and payment demanded; and (2) that notice of protest was not in due time served upon the defendants. The trial judge held, that upon the undisputed evidence it appeared that notice of protest was duly served in proper time upon the defendants, and refused to submit the evidence in relation thereto to the jury, but he submitted the evidence as to the demand of payment to the jury, and they found in reference thereto in favor of plaintiff. The judgment entered upon the verdict of the jury having been affirmed at the General Term, the defendants appealed to this court.

We are of opinion that there was no material question of fact to be submitted to the jury, and that upon the undisputed evidence the plaintiff, as a matter of law, was entitled to a verdict. It is undisputed that the note on the last day of grace was placed in the hands of Mr. Baker, a notary, for demand and protest; that he took the note and went to an office, 111 Broadway, New York, in the Trinity building, where the company either then had or shortly before had had its office, and that he there presented the note and demanded payment thereof of the person in charge of the office, and that there was then a sign at the door of the office, indicating that it was the office of the company.

The only dispute at the trial was whether the place at which the demand was thus made was at the time the office of the company, and there was evidence on the part of the plaintiff tending to show that it was. The evidence on the part of the defendant tended to show, and, if undisputed, did show, that that place had been the office of the company, its last office in this state, but that it had then ceased to be such office. If it was then the office

of the company, it is undisputed that presentment and demand there was properly made; if it was not then the office of the company, it was the last office of the company within this state, and the company being a foreign corporation had removed its office and left the state. In such case it is well settled that no presentment and demand at any place are necessary, in order to charge the indorser. (*Foster v. Julien*, 24 N. Y. 28). It matters not that the plaintiff alleged due presentment and demand in his complaint; that did not preclude him from proof upon the trial that presentment and demand had been waived or rendered useless and unnecessary. So it has been held that under an allegation in a complaint of a tender the plaintiff could, upon the trial prove that a tender had been waived, and thus rendered unnecessary. (*Holmes v. Holmes*, 9 N. Y. 525). Therefore, even if the defendants were right in their contention that the place where the demand was made was not then the office of the company, the result, upon their own evidence, so far as that branch of the case was concerned, should have been the same.

We have now only to consider whether upon the undisputed evidence the defendants were in due time notified of the non-payment of the note. This suit was commenced nearly six years after the note fell due, and the evidence therein was given more than seven years thereafter. After such a lapse of time the memory of witnesses cannot be expected to be full and minutely accurate, and some force should be given to the presumption that official duty was discharged. The last day of grace upon this note was the 3d of March, 1873; on that day the notary presented the note for payment as above-mentioned and protested the same for non-payment. On the following morning he caused notices of protest to be drawn up, one to the defendants, the first indorsers, one to Smith, the second indorser, and another to O. Robinson, cashier, the last indorser, the cashier of a bank at Thomaston, Maine. He signed them all and inclosed them in an envelope and addressed the envelope to Robinson, at Thomaston, and gave the notices so addressed and inclosed to his clerk before two o'clock P. M., on that day, March 4, to mail in the New York postoffice. It was the duty of the clerk to whom the letter was thus delivered to mail it, and he had been in the habit for years of attending to that branch of the notary's business. The clerk was then called, who testified that he had no particular memory of that letter, but that he knew that he mailed notices of protest that day, and that he mailed all the letters that were given him to mail that day between the hours of one and two.

This was all the evidence it was practicable for the plaintiff to give that the notices were mailed at New York. If mailed as testified to by the clerk between one and two on the 4th of March, I do not understand it is disputed that they were mailed in time. It was further shown that a notice mailed in New York at the time named would reach Thomaston in the state of Maine, the residence of Robinson, to whom the letter was addressed, if the train from New York made its connection with the early train north from Boston, in the evening of March 5, but that if the New York train failed to make the connection at Boston, then the letter would reach Thomaston at noon on the 6th of March. It was also shown that this letter reached its address at Thomaston on the 5th or 6th of March, and that the notices for Smith, the next prior indorser, and for the defendants were mailed to Smith at his place of residence, Warren, in the state of Maine, by the next mail after they were received at Thomaston, and that they were received by Smith in the evening of March 6. As there were two mails daily from Thomaston to Warren, a distance of only about four miles, one leaving at 10:10 A. M., and the other at 1:40 P. M., the claim is made that the letter did not reach Thomaston until the 6th of March, after the first mail for Warren had been sent, and thus the appellants claim there was some evidence which would authorize the inference that the letter was not mailed in New York, as claimed by the plaintiff, on the 4th of March. But we think, under all the circumstances, such an inference was unwarranted and could not properly have been drawn by the jury if the case had been submitted to them. The presumption is very strong that Baker, an experienced notary, caused the notices to be mailed to Robinson, as his duty required, on the 4th, and that presumption is fortified by the evidence of himself and his clerk, and that presumption and evidence are not overcome by the fact that the letter did not reach Thomaston until the 6th of March. It may have been delayed in the mails or by failure of the connection at Boston. The fact that the letter did not reach its destination until the 6th of March does not, under the circumstances of this case, furnish any evidence that it was not mailed between one and two o'clock on the 4th of March.

Smith was an aged man, upward of eighty years old. On the morning of March 7 he took the notices for the defendants and drove to Thomaston for the purpose of consulting his counsel, and there, under the advice of his counsel, he wrote a letter addressed to the defendants, and inclosed it with the notice for the defendants in an envelope addressed to them, and caused it to

be mailed at Thomaston, in time for the mail which left there for New York, the residence of the defendant, at 1:40 P. M. That mail passed through Warren, on its way to New York, at 2 P. M. There were two mails each day from Warren, one closing at about 9:30 A. M., and the other at about 1:30 P. M., and that letter went in the same mail that closed at Warren at 1:30. The contention on the part of defendants is, that the law required that that notice should have been mailed by the first convenient, practical mail on the 7th, and hence that it should have been mailed by the first mail on that day; and, to sustain their contention, our attention is called to various authorities. (*Smedes v. Utica Bank*, 20 Johns. 372; *Mead v. Engs*, 5 Cow. 303; *Sewall v. Russell*, 3 Wend. 276; *Howard v. Ives*, 1 Hill, 263; *Haskell v. Boardman*, 8 Allen, 38; *Sussex Bank v. Baldwin*, 2 Harrison [N. J.], 487; *Burgess v. Vreeland*, 24 N. J. L. 71; *Lawson v. Farmers' Bk.*, 1 Ohio St. [N. S.] 206; *Freeman's Bk. v. Perkins*, 18 Me. 292.) These authorities, while not entirely harmonious, undoubtedly tend to sustain the rule that the notice must be sent on the next day by the first practical and convenient post.

The counsel for the plaintiff, however, contends that the rule is, that notice of dishonor in such cases may be sent to the prior party by any post of the next day, and he calls our attention to several authorities which tend to sustain his contention. (*Chick v. Pillsbury*, 24 Me. 458; *Whitwell v. Johnson*, 17 Mass. 449; 2 Daniels on Neg. Instr. 87; Story on Bills, § 288; Story on Prom. Notes, § 324; 3 Kent's Com. 106.)

From a careful examination of all these authorities and many others it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this state. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages

of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law.

In *Mead v. Engs* (5 Cow. 303), notices of dishonor of a bill reached the postoffice at the residence of the last indorser at 5 P. M., and actually came to his hands the next morning. The first mail thereafter for the residence of the prior party left at 1 P. M., but the notices for that party were not mailed until after that hour. Sutherland, J., said: "The cashier was not bound in the exercise of due diligence to have prepared and forwarded notices by the one o'clock mail; it is not reasonable to demand from him the neglect of his other official duties to prepare his letters and notices during the usual banking hours;" and further, that "the law does not require the holder of a bill or note to give the earliest possible notice of its dishonor; it requires of him only an ordinary and reasonable diligence; nor is he bound, the moment he receives notice of the dishonor of a bill, to lay aside all other business and dispatch notice to the prior parties to the bill; if reasonable diligence is used, it is sufficient." In *Darbshire v. Parker* (6 East, 3), Lord Ellenborough observes: "There must be some reasonable time allowed for giving notice, and that, too, accommodating itself to other business and affairs of life; otherwise it is saying that a man who has bill transactions passing through his hands must be nailed to the postoffice, and can attend to no other business, however urgent, till this is dispatched."

It does not appear here how far Mr. Smith lived from the postoffice at Warren; he was an aged man and wanted some advice about the matter. Early on the day after he received the notices, he went to Thomaston to see his counsel, and thus he missed the mail, which closed at Warren at 9:30. We think it cannot be said that the delay was unreasonable, or that there was the absence of that proper diligence which the law requires. There was, therefore, no error in holding as matter of law that due diligence was used by Smith in posting the notice to the defendants.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

WHERE NOTICE MUST BE SENT.

§ 110.

Chouteau v. Webster (1843), 6 Metc. (Mass.) 1, 39 Am. Dec. 705.

Assumpsit by the indorsee against the indorser of two promissory notes, dated at the city of New York, March 24th, 1837, and payable at the Merchants Bank in that city, on the 1st of October, 1837. The case came before the court on the following agreed statement: On the last day of grace, viz., on the 4th of October, 1837, about three o'clock P. M., the notes were delivered by the holders thereof to T. W. Christie, a notary public residing in the city of New York, who straightway presented each of them to the paying teller of said bank, while the bank was open for the transaction of business, and demanded payment of the same of the said teller, who refused to pay them, or either of them, for want of funds of the makers. The notes were duly protested, by said notary, for non-payment, and written notices, signed by him, of the protest of each of said notes, and that the holders looked to the indorsers for payment thereof, were by said notary, by direction of the holders, put into the postoffice in said city, on the morning of the 5th of said October. The notices to the defendant, as first indorser of each of said notes, were directed to him at Washington, in the District of Columbia. The defendant's general domicil and place of business was in Boston, where he at all times had an agent, who had the charge and management of his business affairs, in his absence; but from the 7th of September, 1837, to the 16th of October following, the defendant was at said Washington, attending to his duties as a senator in congress from this Commonwealth, during the extra session held that year.

Letters from New York usually reach Washington in about 48 hours, in the regular course of the mail. Such letters, as are addressed by mail to members of the senate, during the session of congress, are taken from the Washington postoffice, by officers of the senate, appointed for that purpose or charged with the duty, and delivered to the members in their places, when the senate is actually in session, and on other days are delivered, by those officers, to members at their lodgings; and such was the usual course with regard to letters addressed by mail to the defendant, during the extra session of September and October, 1837.

The making and indorsement of the said notes, and the consideration thereof, are admitted. All matters of fact, as well as of law, involved in the case, are submitted to the decision of the court, who may make such inferences from the facts stated, as a jury would be authorized to make. If any facts are contained in this statement, which it would not be competent for either party, on a trial before a jury, to prove or put into the case, upon the other party's objecting thereto, such facts shall be stricken out by the court, and neither party shall be in any way prejudiced by their having been inserted herein. And if, in the opinion of the court, it shall be necessary to the rights of either party, the case may be opened for the introduction of evidence touching facts that may be deemed material; whether they are embraced in this statement, or not. But if no further evidence or facts shall be introduced, and the court are of opinion that the facts stated would justify a jury in finding a verdict for the plaintiff, a default is to be entered, and judgment rendered thereon for the plaintiff; otherwise, the plaintiff is to become nonsuit.

W. J. Hubbard & Watts, for the plaintiff.

J. P. Rogers & Healy, for the defendant.

SHAW, C. J. It is admitted that these notes were duly made and indorsed; that they were seasonably presented for payment at the bank in New York, where by their terms they were payable, and payment refused; that notice thereof, in due form, was seasonably prepared by the proper officer, and put into the post-office; and the only question is, whether, under the circumstances stated, it was rightly addressed to the defendant, at Washington.

The mercantile law, regulating the liabilities of parties to notes and bills, does not require proof of actual notice of dishonor to an indorser, in order to charge him; but reasonable care and diligence in giving such notice.

The inference is very strong from the facts stated, as strong, perhaps, as mere circumstantial evidence could make it, that the notice actually reached the defendant at Washington. He was a senator of the United States; the senate was then in session; and such precautions were taken, in regard to letters addressed to senators, as to ensure their delivery with promptness and certainty.

The ground relied upon, to show that such notice was not sufficient, is, that the defendant's general domicile and place of business was in the city of Boston, where he had, at all times, an agent, who had the charge and management of his affairs.

But it does not appear that he had made any request to have notices sent to him at Boston, or that any actual or constructive notice was had by the holder of these notes, that he had an agent at Boston. This fact, therefore, must be considered immaterial. The defendant, though his domicil was at Boston, was actually resident at Washington, in discharge of his public duties as a senator, at a session of congress, called by public proclamation, and continued until after the time at which this notice was sent; so that the place, where he might be presumed to be actually residing, was fixed and well known by the nature of these duties. Under these circumstances, the court are of opinion, that notice to the defendant, by mail, addressed to him at Washington, was good and sufficient notice of the dishonor of these notes.

This decision is founded on the circumstances of the particular case, and may be varied by other facts. It is not like the case of a merchant stopping, for a day or two, at a hotel or watering place, or on a journey of business or pleasure; though we are not prepared to say that actual personal notice to an indorser, at such place, would not be sufficient; but of this we give no opinion.

Nor is it like the case of a banker or merchant, having extensive dealings in negotiable securities, having an open, fixed, and well-known establishment and place of business, with agents having the custody of his funds, the keeping of his accounts, and generally charged with the transaction of his business in his absence. Such circumstances might, perhaps, amount to constructive notice to the holders of such securities, that such was the indorser's place of business, and of his request and direction that notice should be addressed to him there. It might, in this view, be sufficient to show, that notice so given would be good and sufficient, though it would still be open to the question, whether other notice would not be equally good.

The fact of domicil is one circumstance only, in determining where notice shall be given. A man may retain his domicil at a place, though in fact personally absent therefrom, and absent with his family for years. Such is the condition of a president of the United States, or cabinet minister, residing at Washington, or of an ambassador in a foreign country. His domicil is not thereby changed; but yet we cannot doubt, that notice to such public officer, at the place of his actual residence, to which, for the time being, he is fixed by his public duty, would be good notice. Yet the only distinction between a president of the United States and a senator is, that the residence of the former at Washington is somewhat more protracted, and uninterrupted

by the intervals between sessions of congress, than that of the latter.

We place no great reliance, in this decision, upon another rule, which seems to be well established, and to embrace the present case; namely, that notice at a postoffice, where the party usually receives his letters, though not the place of his domicile, is good notice. *Reid v. Payne*, 16 Johns. 218. It is conformable to the more general rule, sustained by many authorities, that notice shall be so given, and at such place, that it will be most likely to reach the indorser promptly. *Bank of Columbia v. Lawrence*, 1 Pet. 578; *U. S. Bank v. Carneal*, 2 Pet. 553.

Judgment for the plaintiff.

WAIVER OF NOTICE CONTAINED IN INSTRUMENT. § 112.

Phillips v. Dippo (1894), 93 Iowa 35, 57 Am. St. Rep. 254.

Appeal from Tama District Court. HON. J. R. CALDWELL, Judge.

Action at law upon a negotiable promissory note. A demurrer to the petition was overruled, and, the defendant electing to stand upon his demurrer, judgment was rendered in favor of the plaintiff for the amount which appeared to be due on the note. The defendant appeals. Affirmed.

Wm. H. Stivers, for appellant.

Vincel Drahos, for appellee.

ROBINSON, J.—The note in suit was made payable to defendant or bearer, and contains the following: "The makers, indorsers, and guarantors of this note * * * hereby waive presentment for payment, notice of non-payment, protest, and notice of protest, and diligence in bringing suit against any party thereto." Before the maturity of the note, the defendant wrote his name thereon, and transferred it, and it is now owned by the plaintiff. The grounds of the demurrer are that the defendant is an indorser of the note, and the petition fails to show that the note was duly presented for payment, that payment was refused, and that the defendant was notified of the non-payment. The question we are required to determine is whether the waiver of presentment for payment, protest, and notice of non-payment, contained in the body of the note, is effectual as against an indorser in blank,

who was also the payee. It is contended by appellant that such an indorsement is a new, independent written contract between the indorser and indorsee, with conditions implied by law, and that it has no reference to a provision in the note of the character of that in question. It was said in *Davis v. Miller*, 88 Iowa, 114, 55 N. W. Rep. 90, that "an indorsement constitutes a new agreement with the indorsee, by which the indorser agrees that the instrument will be paid at maturity, and, if it is not so paid upon proper demand, that he will pay it if duly notified of the default;" and it was held that the blank indorsement of a negotiable promissory note payable by its terms at a designated place did not require the indorser, when his liability became fixed, to pay the note at that place. The reason for that conclusion was that such indorsements are governed by the law of the place where they are made, and create obligations which are to be performed there, or generally, and not at a place specified. In other words, it was held that implied obligations created by the blank indorsement relate to the time and amount, but not to the place, of payment. There was nothing in the body of the note under consideration in that case which referred in terms to the indorser. None of the authorities relied upon by the appellant are applicable to this case, for the reason that in none of them did the instrument in question contain a provision in any respect like the one we have set out. The part of that which referred to indorsers and guarantors was without force as between the maker and payee, and was designed to take effect only if the note should be indorsed. When the defendant wrote his name on the back of the note, and transferred it without in any manner qualifying the effect of the indorsement, he necessarily became a party to the agreement of waiver, and was not entitled to the demand and notice which an ordinary indorsement in blank requires. And this result does not in any manner depend upon the fact that he was the payee of the note. It is said in Tied. Com. Paper, section 363, that, "if the waiver is put in the body of the instrument, it enters into and forms a part of the contract of everyone who signs his name to the paper, whether as drawer or indorser." In 2 Daniel, Neg. Inst., section 1092, the law is stated as follows: "Sometimes the waiver is embodied in the instrument itself, and in such cases the waiver enters into the contract of every party who signs it, whether as drawer, maker, acceptor, or indorser. Thus, when the words 'presentation and protest waived,' or 'notice and protest of non-acceptance and non-payment waived,' are written in the bill, they are binding, not only upon the drawer, but also

upon the indorsers, who are in effect new drawers, and who become parties to the waiver in becoming parties to the bill. Clearly, this is the case where such waiver expressly includes the drawer and indorsers." The rule of these authorities has support in the following cases: *Lowry v. Steele*, 27 Ind. 170; *Bryant v. Lord*, 19 Minn. 405; *Bank v. Ewing*, 78 Ky. 266; *Bryant v. Bank*, 8 Bush, 43; *Smith v. Lockridge*, Id. 431. See, also, *Woodward v. Lowry*, 74 Ga. 148; *Studebaker v. Ryan*, 46 Kan. 273, 26 Pac. Rep. 700. We conclude that the demurrer was properly overruled, and the judgment of the District Court is

Affirmed.

ORAL WAIVER.

§ III.

Annvile Nat. Bank v. Kettering (1884), 106 Pa. St. 531, 51 Am. Rep. 536.

Assumpsit on promissory note. Defendant had judgment below. Opinion states the point in dispute.

Josiah Funck & Son, for plaintiff in error.

W. M. Derr, for defendant in error.

Mr. Justice STERRETT delivered the opinion of the court.

No principle of the law merchant is better settled than that demand and notice of the non-payment of a negotiable note may be waived by the indorser, either orally or in writing, or by acts clearly calculated to mislead the holder and prevent him from treating the note as he otherwise would, but there is some diversity of opinion as to what constitutes a waiver of these necessary prerequisites to charge the indorser. When a written waiver of "demand and notice" accompanies the indorsement, or is given by the indorser before maturity of the note, there can be no question as to its legal effect; nor can there be any doubt when the language employed clearly imports or implies the same thing. It has been doubted, however, whether the words "protest waived," written on a note by the indorser, or his separate request in writing not to protest it, is a waiver of both demand and notice, and in some cases these words have been considered insufficient to dispense with either; but the weight of both reason and authority is that they do constitute a waiver of both. Strictly speaking, the term "protest" applies only to foreign bills, but the custom to treat inland bills and notes in the same manner as foreign bills has become so well-nigh universal that, in common

parlance, the term means the taking of such steps as are required to charge the indorser. For the same reason, the word "protested," sometimes employed in giving notice of dishonor to indorsers of inland bills and notes, clearly implies demand, non-payment, and consequent dishonor of the bill or note in all cases where protest is necessary: 1 Pars. Bills and Notes, 471, 575, 579, 582, and authorities there cited.

It is not essential that the waiver should be in writing. When the fact is established by competent evidence, a parol waiver is as valid and binding as a written one. The only difference is in the character of the proof: *Barclay v. Weaver*, 7 Harris, 396. It was there held that a verbal agreement between the holder and indorser to renew a note at maturity, might be shown by oral testimony, and that demand and notice were thereby dispensed with. The general principle underlying nearly all cases of waiver is that the indorser has by word or deed done something calculated to mislead the holder and induce him to forego the usual steps to fix the liability of the former.

It is unnecessary to refer specially to several well-considered cases in other states, holding that a waiver of protest, without more, dispenses with demand and notice of non-payment. They are in full accord with our own cases on the subject, the last of which is *Huckenstein v. Herman*, 34 Leg. Int. 232. That was a suit by the holder against the indorser of a note which was not presented for payment at maturity. To sustain the averment of demand and notice of non-payment, the plaintiff relied on the words "protest waived" written on the note and signed by the indorser the day before, or early in the morning of the day the note matured. The court charged in substance that the words were equivalent to an express waiver of demand and notice, and on that point there was a verdict for the plaintiff. In the *per curiam* opinion of this court, affirming the judgment of the Common Pleas, it is said: "A waiver of protest before maturity of a note is a waiver of all the steps leading to it, and includes demand and notice of non-payment. This, we think, is the general understanding of a waiver of protest among business men. The very purpose of a waiver is to supersede the ordinary steps and avoid trouble and expense. To waive the mere act of the notary, and yet suffer the duty of making demand and giving notice of its result to remain, would scarcely be thought of by business men." It is argued by the learned counsel of defendant that this conflicts with the former ruling of this court in *Scott v. Greer*, 10 Barr., 103, but we do not so understand it. In that case it was

held that the waiver of a protest by an indorser on the day the note matured puts him in the same situation as if the protest had been made and proved; and, there being no contradictory evidence, it is proof under the Act of Assembly of demand, refusal and notice. It is true the learned judge who delivered the opinion in that case intimates that the *prima facie* case thus presented by the plaintiff might have been rebutted by showing that no demand was, in fact, made; but what was said on that subject was aside from the question before the court, and, in so far as his remarks may be considered in conflict with the ruling in *Huckenstein v. Herman*, supra, they cannot be regarded as authority for the position that a waiver of protest does not necessarily imply a waiver of demand and notice. The principle decided in *Huckenstein v. Herman* is akin to that involved in *Ridgway & Budd v. Day*, 1 Harris, 208, and *Brittain v. The Doylestown Bank*, 5 W. & S., 87. In the latter case the indorser, by memorandum on the note, waived "notice of non-payment by the maker," and it was held that proof of demand was thereby rendered unnecessary. "The interpretation," said Gibson, C. J., "is that he agreed to become immediately liable, without more, in case the note should not be taken up at maturity."

In the case at bar it is conceded there was neither demand nor notice of non-payment, nor was there any written waiver of protest. For the purpose of sustaining the material averment of demand and notice, testimony was introduced by plaintiff tending to prove, in substance, that during a course of dealing with the bank, defendant had several notes discounted, and the proceeds placed to his credit; that when he first requested a discount, he informed the officers of the bank that, desiring to deal with them, he would be obliged to apply for discounts, and wished it to be understood that none of his notes should be protested; that, pursuant to this request, none of them were protested, nor was payment of them demanded of the maker; and, in consequence of that understanding, payment of the note in suit was not legally demanded, nor was notice of non-payment given to defendant. In view of this testimony the court was requested to charge:

"1st. If an indorser gives directions to the indorsee, at the time or before he brings the note for discount, that the same shall not be protested, and this is assented to by the indorsee, it relieves the latter from the duty of making demand for payment of the maker, and of giving notice of the non-payment to the indorser of such note."

"2d. If the defendant waived protest of the note before

maturity, no demand of the maker was necessary to charge him with its payment."

The learned judge refused these points, saying: "Such waiver of protest is *prima facie* evidence of presentment to and demand upon the maker, but it does not relieve the indorsee from the necessity of such presentment and demand;" and he further instructed the jury, in substance, that if, in point of fact, no demand was made or no notice given to defendant, the plaintiff could not recover. It being conceded that there was no legal demand or notice, the verdict, as matter of course, was for defendant. The plaintiff's testimony, if believed by the jury, was clearly sufficient to have warranted them in finding the facts as stated in the foregoing points, and, for reasons already suggested, they should have been affirmed.

When the alleged waiver is in writing, its construction is for the court, but when it consists of verbal communications, it is the special province of the jury to consider the testimony and ascertain the facts. When ascertained, it is their duty to apply the law under the direction of the court. Assuming the facts to be as recited in the points, the law as therein stated is correct, and hence there was error in refusing to affirm plaintiff's first and second points, and in charging the jury as complained of in the third specification.

Judgment reversed, and a venire facias de novo awarded.

WAIVER BY IMPLICATION.

§ III.

Gove et al. v. Vining (1843), 7 Metc. (Mass.) 212, 39 Am. Dec. 770.

Assumpsit by the indorsees against the indorser of the following note: "Scituate, December 27th, 1841. Four months after date, for value received, I promise to pay to the order of Polly Vining one hundred and three dollars and eighteen cents at either bank at Boston. Alexander Vining." This note was indorsed in blank by the defendant.

The plaintiffs, to prove their declaration, offered the deposition of C. E. Fogg, who deposed, that he, on or about the 27th of April, 1842, at the request of his father, Eben. T. Fogg, took the said note, and also a written notice requesting payment of said note, and went to the dwelling-house of Polly Vining and Alexander Vining; that he saw said Polly, but did not see

said Alexander, he not being at home; that he handed to said Polly the note and written notice, and she read them, and said that Alexander was going down to see the deponent's father in a short time, and wished he would not sue the note until Alexander saw him: That said notice was in the following words: "A note dated December 27th, 1841, signed by Alexander Vining, and indorsed by you, for \$103.18, and payable in four months from date, is now due, and you are requested to pay the same. Ebenr. T. Fogg, Atty. April 28th, 1842."

The defendant admitted that the statements in the deposition were true, and the parties took the case from the jury, and agreed that the court, on those statements, should render judgment for the plaintiffs or for the defendant, according to their opinion thereon.

Eddy, for the plaintiffs.

Kingsbury, for the defendants.

SHAW, C. J. The plaintiffs seek to recover of the defendant, as indorser, the amount of a promissory note, made by Alexander Vining to the defendant or her order, and by her indorsed. The note was dated December 27th, 1841, payable at four months from date at either bank in Boston. The defence relied on was, that there was no demand on the maker, and no notice of dishonor to the defendant as indorser. The plaintiffs relied on a waiver of demand and notice by the defendant

The facts were testified to, in a deposition of C. E. Fogg, son of the agent with whom the note was deposited by the plaintiffs for collection, and were subsequently agreed to, as a statement of facts. It appears, by this statement, that on the day the note nominally fell due, but before the days of grace, the deponent, by direction of his father, took the note, and went to the house where both the promisor and indorser lived. He carried with him a written demand on the indorser, for payment. This, however, though payment was not then made, would not amount to a dishonor of the note, both because the days of grace had not expired, and it was not yet due; and because it was payable at a bank in Boston. But there was still ample time to send it to Boston, and place it in a bank there for collection, if nothing had been done by way of waiver by the indorser. It appears that the messenger did not see the promisor, but he saw the indorser, the defendant, and handed to her the written demand and the note, and she read them. She said that Alexander, the promisor, was going down to see the messenger's father (who had charge of

the note for the holders) in a short time, and wished he would not sue it until Alexander saw him. Although, literally, this was stated as the request of the promisor, yet it was made by the indorser, without any restriction or qualification on her part, and therefore may be considered the same as if it were her own. It was therefore a request, by the indorser, to the holders, through their agent, with full notice that the note was then nominally due, (though not legally payable till three days after) for forbearance of payment. It was calculated to induce the holder to believe that the parties who were liable were about making some arrangement or some proposal, by which it would be paid, if he would forbear resorting to coercive measures for a short time.

And the court are of opinion that when the indorser, at or shortly before the time when the note becomes due, says to the holder, that an arrangement for its payment is about being made, and in direct terms, or by reasonable implication, requests the holder to wait or give time, it amounts to an assurance that the note will be paid—that the promisor or indorser will pay it—and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place; and it would be contrary to good faith, to set up such want of demand and notice—caused perhaps by such forbearance—as a ground of defence. (*Leffingwell v. White*, 1 Johns. Cas. 99; *Mechanics Bank v. Griswold*, 7 Wend. 165; *Leonard v. Gary*, 10 Wend. 504; *Taunton Bank v. Richardson*, 5 Pick. 436; *Thornton v. Wynn*, 12 Wheat. 183; *Wood v. Brown*, 1 Stark. R. 217).

Judgment for the plaintiffs.

WHEN NOTICE DISPENSED WITH.

§ 114.

Bacon v. Hanna, imp. (1893), 137 N. Y. 379.

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

This was an action upon a promissory note made by defendant, J. Sawyer Hanna, payable in two months after date to the order of A. E. Hanna. It was indorsed by the payee and the defendants, Morris W. Hanna and W. Dwight Munger. Morris

W. Hanna refused to submit any question to the jury and alone defended. The court directed a verdict for defendant, to which plaintiff's counsel excepted. A verdict was rendered in accordance with the direction.

The facts, so far as material, are stated in the opinion.

John Gillette, for appellant.

Edwin Hicks, for respondent.

FINCH, J. The complaint involved in this appeal respects the ruling of the court, which determined, as matter of law, that due diligence had not been exercised in giving notice of protest to the indorser, and refusing to submit the question, as one of fact, to the decision of the jury. The General Term sustained the ruling, and we are inclined to approve it, as justified by the facts.

The indorser lived in the town of Hopewell, and his postoffice address was at Chapinville in that town. He had resided in the same place for nineteen years, and at the time of the maturity of the note was supervisor of his town, which adjoined the village of Canandaigua, and had held that office for two years. His home was four miles east of the east line of the village, and the notary who served the notice had been at his house and consequently knew of its location. He knew also that the indorser was supervisor of the town of Hopewell, and had mailed a notice of protest of a note preceding the one in suit, and of which the latter was a renewal to the same indorser at Chapinville. Inquiry of the maker of the note; at the postoffice in Canandaigua; or of business men in that village; would have disclosed the residence of the indorser easily and correctly. What the notary did was to mail a notice directed to the indorser at Canandaigua, under the provisions of the act of 1857 (Chap. 416, § 3), which permits such notice by mail where the indorser lives in the same city or town, or has a place of business therein, or has indicated such residence by a memorandum added to his signature, or where, "from the best information obtained from diligent inquiry," he is "reputed" there to reside or have a place of business. We may assume that the notary may have forgotten for the moment his previous action in mailing a notice to Chapinville, and was in doubt about the residence of the indorser, although with the knowledge which he had and some reasonable reflection upon the subject it would seem that his memory might not have failed him, but his only effort to solve the doubt was to look into a directory of Canandaigua to ascertain the truth. He there found this entry: "Hanna, Morris W., 158 Canandaigua." The record does not show whether or

not there is a street in the village bearing its name. If there is, inquiry at that number would have disclosed the error. If there is not, the entry was sufficiently odd and peculiar to make the notary's alleged understanding that the figures meant number of acres owned in Canandaigua inexcusable without some further inquiry. Prior to the act of 1857 service upon the indorser residing in the same town at his place of business therein was required. The change permitting instead a service by mail was carefully guarded and limited. Where the notary relied upon a "reputed" residence he was required to act from "the best information obtained by diligent inquiry." Merely looking into a directory is not enough. The sources of error in that process are too many and too great. Such books are accurate enough in a general way and convenient as an aid or assistance, but they are private ventures, created by irresponsible parties and depending upon information gathered as cheaply as possible and by unknown agents. Their help may be invoked, but, as was said in *Laurence v. Miller* (16 N. Y. 231), their error may excuse the notary, but will not charge the defendant. Merely consulting them should not be deemed "the best information obtained by diligent inquiry." (*Greenwich Bank v. De Groot*, 7 Hun, 210; *Baer v. Leppert*, 12 id. 516). These cases differ somewhat in their facts, but clearly indicate that bare reliance upon a directory is not sufficient diligence, and that should certainly be the rule upon facts such as are disclosed in the present case.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

AGREEMENTS TO WAIVE STRICTLY CONSTRUED. § III.

Freeman v. O'Brien (1874), 38 Iowa 406.

Appeal from Johnson Circuit Court.

This action is brought on a promissory note, against William O'Brien as maker, and Michael Cash as indorser thereof. The defendant Cash demurred to the petition. The court sustained the demurrer and plaintiff appeals. The further facts are stated in the opinion.

Williams & Ewing, for appellant.

Boal & Jackson, for appellee.

MILLER, Ch.J.—The note upon which suit is brought is negotiable. It is alleged that before the maturity thereof it was indorsed in blank by Michael Cash, the payee thereof, to the plaintiff, and that the indorser had notice of the dishonor of the same; that demand for payment was made and refused *after the note matured*, and that notice in writing of such demand was given to Cash about four years after the maturity of the note. It is further alleged in an amendment to the petition that plaintiff bought the note from Cash, paying him the full amount thereof; that at the time of the indorsement and transfer of the note it was orally agreed between the parties that "the plaintiff should not sue on said note but wait until defendant O'Brien could pay said note, or until Cash should give notice to commence action on said note;" that at numerous times between the transfer of the note and the commencement of this action, "Cash has notified plaintiff not to push or distress said O'Brien and at all times assured plaintiff that he as indorser would stand good for the payment of said note;" that "on or about the time of the maturity of said note plaintiff gave notice of the same to O'Brien who nevertheless failed to pay the same;" that at or about the day of the commencing of this suit, Cash came to plaintiff and notified him that he would not stand good any longer for said note unless plaintiff should at once commence an action to recover the amount of said note, and on the same day plaintiff took steps to commence this action."

The court sustained a demurrer to the petition as amended, which ruling is assigned as error.

1. It is conceded that the plaintiff did not, upon the maturity of the note, make due demand upon the maker of the note, and give due notice to the indorser of the failure to pay by the maker. It is claimed, however, that the indorser waived the necessity of demand and notice required by the commercial law in order to fix an absolute liability upon him, and that he is therefore liable, notwithstanding the failure to make due demand and give due notice.

Appellant urges that the verbal agreement, alleged to have been made at the time of the transfer of the note to plaintiff, to the effect that plaintiff should not sue the maker, O'Brien, until he could pay or until the indorser should notify plaintiff to sue, operated as a waiver of demand and notice. It seems clear to us that this would be giving to this alleged agreement a meaning and effect far beyond its scope, and not within the contemplation of the parties. The agreement that suit was to be delayed, by no

means exonerated the plaintiff from the duty of making demand upon the maker at the maturity of the note, and from giving the indorser due notice of default in payment. These acts were necessary to fix an absolute liability upon the indorser, and they could be done without infringing upon the agreement to delay suit on the note. There is no inconsistency between the agreement alleged and the duty to make demand and give notice.

The substance of the alleged agreement is that if, at the maturity of the note, the maker was not able to pay, the plaintiff was not to sue until he was able, or until the indorser gave notice that he should sue. From the terms of the agreement it is reasonably clear that it was contemplated by the parties that demand of payment should be made upon the maker of the note at maturity, else how was it to be known whether he was able to pay or not. It is equally clear that in case of the refusal of the maker to pay on demand, the indorser was, under the agreement, entitled to notice, so that he could determine whether or not to require the plaintiff to sue.

2. It is further alleged that Cash constantly after the indorsement assured plaintiff that he would stand good for the payment of the note. It is claimed that this agreement or assurance operated as a waiver of demand and notice. Agreements of this sort are always construed strictly and are never extended beyond the fair import of the terms used. (*Berkshire B'k v. Jones*, 6 Mass., 524; *Central B'k v. Davis*, 19 Pick., 373; *Union B'k v. Hyde*, 6 Wheat., 572; *May v. Coffin*, 4 Mass., 341; *Backus v. Shepherd*, 11 Wend., 629). If the alleged assurance or promise to stand good was made prior to the maturity of the note, it would be an undue extension of its terms to hold that the indorser intended thereby to stand good for the payment of the note absolutely, notwithstanding plaintiff should fail to make demand and give him notice of non-payment. An understanding as follows: "I do request that hereafter any notes that may fall due at the Union Bank, on which I am or may be indorser, may not be protested, as I will consider myself bound in the same manner as if the same had been legally protested," was held in *Union Bank v. Hyde*, *supra*, to be so ambiguous and doubtful whether it was intended thereby to waive demand and notice, that further proof of such intention was required. In that case there was doubt as to the intention of the party, and under the rule of strict construction further evidence was demanded. In the case before us the language used does not approach near enough to a waiver to become doubtful.

Under the allegation in the petition the assurances or promises to stand good were made after the maturity of the note as well as prior thereto. It is well settled that an indorser of a negotiable instrument may waive the objection of a want of due presentment and notice, by a promise to pay the same made after default, but in order to make such a waiver binding "it must be clearly established and deliberately made after a full knowledge of the facts," and it will not be presumed or implied from doubtful circumstances, or sudden acknowledgments, or hasty expressions. (*Ballin v. Betcke et al.*, 11 Iowa, 204; *Allen v. Harrak*, 30 Iowa, 363; Story on Prom. Notes, § 275, and notes; 1 Parsons on Notes and Bills, 601). The law will not infer that an indorser, who promises to pay the note after maturity, had knowledge that it was not duly presented. (*Abbott v. Striblen*, 6 Iowa, on p. 197). The party alleging the promise must also allege and prove that it was made with a full knowledge of the fact that the promisor was released from legal obligations to pay the same. (*Ballin v. Betcke et al.*, *supra*). In the case before us there is no allegation that the indorser, at the time of the alleged promises, made after the maturity of the note, had knowledge that the note had not been duly presented to the maker for payment at maturity and payment thereof refused. There is indeed no allegation that he had any knowledge whatever in respect to the fact of presentment. The judgment of the Circuit Court will be

Affirmed.

EXCUSE OF NOTICE, TEMPORARILY OR PERMANENTLY. §§ 114-115.

Windham Bank v. Norton. (See page 384.)

Pier v. Heinrichshoffen. (See page 392.)

WHERE NOTICE NEED NOT BE GIVEN TO INDORSER. § 117.

In re Swift. (See page 400.)

Am. Nat. Bank v. Junk Bros. (See page 420.)

LIABILITY OF DRAWEE RETAINING THE BILL. § 139.

Westberg v. Chicago Lumber & Coal Co. (1903), 117 Wis. 589.
See § 3-4.

Appeal from a judgment of the Circuit Court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action upon a negotiable bill of exchange drawn upon the defendant in favor of the plaintiff by the Lien-Neally Lumber Company for \$585, alleged to have been accepted by the defendant. The answer was a general denial. The evidence disclosed that the Lien-Neally Company, sawmill owners, had purchased from the plaintiff certain logs or stumpage amounting to \$585; that they had sold product of their mill, including that of these logs, to the defendant, and were in the habit of making orders and drafts upon the latter for money to pay their various bills. About April 21st, upon plaintiff's application for payment, they made out an order upon the defendant substantially as follows:

"To Chicago Lumber & Coal Co.:

"Please pay to John Westberg five hundred eighty-five (585) dollars for logs delivered at Bibon as per contract.

"[Signed] LIEN-NEALLY LUMBER CO."

They had plaintiff write his name on the back of it, and then Mr. Lien mailed that order, in connection with other orders and time-checks aggregating some \$2,000, to the defendant, accompanied by a letter the contents of which are not disclosed. The defendant's representative denied any memory of the order or draft in favor of the plaintiff. It was proved, however, that he sent to the Lien-Neally Company the money for the other orders inclosed in the same letter. Plaintiff never heard from the defendant, but made repeated applications to the Lien-Neally Company for payment, and was put off from time to time by promises, until finally they refused to pay, saying he must look to the defendant. At that time the defendant had paid drafts of that company to more than the amount of the indebtedness to it, and refused to pay this. The plaintiff's draft never was returned to him.

On the trial, a special verdict being requested, the court submitted but one question, namely, whether the defendant received this draft on or before April 23d, which was answered in the affirmative, and thereupon the court found that the plaintiff delivered that order for acceptance on or before April 23d;

that it was received by the defendant, and was by it destroyed, and that the defendant is indebted to the plaintiff in the amount thereof, with interest; the last conclusion being predicated upon the theory that the retention and destruction of the order constituted an acceptance. From judgment in accordance with that finding the defendant appeals.

For the appellant there was a brief by *Lamoreux & Shea*, an oral argument by *W. F. Shea*.

E. F. Gleason, for the respondent.

DODGE, J. Rendition of judgment in favor of plaintiff in this case can be justified only on one of two theories—either that in law an implication of acceptance results from the mere physical receipt of a bill of exchange by the drawee, followed by silence, or that all other facts essential to such implication were undisputed or were supported by inference from undisputed facts so clear and unavoidable that no reasonable mind could draw any other. Appellant had the right to have each controverted question of fact decided by the jury.

Upon the question of law as to when implied or constructive acceptance takes place, the authorities are reasonably clear and approximately unanimous. Upon delivery for acceptance, the drawee is not bound to act at once. He has a right to a reasonable time—usually twenty-four hours—to ascertain the state of accounts between himself and the drawer, and until expiration of that time the holder has no right to demand an answer, nor, without categorical answer, to deem the bill either accepted or dishonored; not accepted, because of the right of drawee to consider before he binds himself; not dishonored, because both drawer and drawee have the right that their paper be not discredited during such period of investigation. After the expiration of that reasonable time the holder has a right to know whether the drawee assumes liability to him by accepting, and, if not, he has a right to return of the document, so that he may protest or otherwise proceed to preserve his rights against the drawer. The concensus of authority is, however, that the duty rests on the holder to demand either acceptance or return of the bill, and that mere inaction on the part of the drawee has no effect. After the expiration of this time for investigation, the drawee may, by retention of the bill, accompanied by other circumstances, become bound as an acceptor; not, however, by mere retention. There seem to be two phases of conduct recognized by the authorities as charging the drawee: one purely contractual, as

where the retention is accompanied by such custom, promise, or notification as to warrant the holder, to the knowledge of the drawee, in understanding that the retention declares acceptance; the other, where the conduct of the drawee is substantially tortious and amounts to a conversion of the bill. This is the phase of conduct which our negotiable instrument statute (sec. 1680k, ch. 356, Laws of 1899) has undertaken to define and limit as refusal (not mere neglect) to return the bill, or destruction of it; reiterating the common-law rule that mere retention of the bill is not acceptance. (*Overman v. Hoboken Bank*, 31 N. J. Law, 563; *McEowen & Co. v. Scott*, 49 Vt. 376; *Colo. Nat. Bank v. Boettcher*, 5 Colo. 185; *Dickinson v. Marsh*, 57 Mo. App. 566; *Dunavan v. Flynn*, 118 Mass. 537; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210; *Gates v. Eno*, 4 Hun. 96; *Matteson v. Moulton*, 11 Hun. 268, affirmed 79 N. Y. 627; *Hall v. Steel*, 68 Ill. 231; *First Nat. Bank v. McMichael*, 106 Pa. St. 460; *Koch v. Howell*, 6 Watts & S. 350; *Short v. Blount*, 99 N. C. 49, 5 S. E. 190; *Boyce v. Edwards*, 4 Pet. 111; *Bank of the Republic v. Millard*, 10 Wall. 152; 1 Daniel, Neg. Inst. §§ 499, 500.) The doctrine of constructive acceptance is based on the general principles of estoppel. If the conduct of the drawee will prejudice the existing rights of the holder, unless it means acceptance, and the drawee has knowledge of such fact, he is estopped to deny the only purpose which could render his conduct innocuous; namely, acceptance of the bill. This underlying principle suggests the reasons for many of the limitations upon the implication of acceptance from conduct; as, for example, that such implication arises only when the bill is presented *for acceptance*, and that no one but the holder (payee or indorsee) can make such technical presentment. 2 Randolph, Comm. Paper, §§ 568, 572; 1 Daniel, Neg. Inst. § 455; sec. 1681—2, Neg. Inst. Law Wis. ch. 356, Laws of 1899. Only when the drawee knows that acceptance is accepted would he suppose that his conduct can lead to a belief that he does accept. Only when the presentment is by the holder, whose conduct and rights must be affected by acceptance or refusal, is the drawee charged by the strict rules of the law merchant with notice that his conduct may so injuriously affect the person delivering the bill to him.

In the light of these rules of law it is at once apparent that the verdict alone does not present sufficient facts to charge defendant with constructive acceptance. Not only must he have received the bill, as the jury found, but he must knowingly have received it from the payee or his authorized agent, and *for*

acceptance; and even then there must have been something more than mere retention—either destruction or refusal to return to the holder, if within the negotiable instrument statute, or some circumstances, contractual or tortious, to arouse estoppel, if, by reason of non-negotiability, this instrument is governed only by the common law. We must, therefore, turn to the evidence to ascertain whether all these necessary additional facts were established beyond controversy. True, the court filed so-called findings of fact declaring some of them to exist, but, as appellant claimed that the fact of acceptance should be submitted to the jury, it did not consent that the court might assume to decide either the facts or the inferences therefrom, unless free from controversy.

The only evidence of the manner and purpose of the sending of this draft is that the drawer sent it in the same inclosure with numerous other documents similar in form, with which plaintiff had no connection. The contents of the accompanying letter are not disclosed, but it is reasonably clear that the other orders were not sent for acceptance on behalf of the payees therein, but merely as vouchers between the drawer and drawee; for, evidently as expected, the latter sent money in response thereto direct to the drawer. The plaintiff's order or draft, having no time of payment expressed, was payable on demand, and did not need to be presented for acceptance, and therefore did not of itself suggest any demand for such action. 1 Randolph, Comm. Paper, § 119; 1 Daniel, Neg. Inst. § 454. The witness Lien testified, "I mailed it in behalf of the Lien-Neally Lumber Co." Plaintiff said: "I didn't mail it myself. Lien said he would mail it. I left it to him." And again: "I was expecting money on this draft. Mr. Lien said he would send the money down to me." This is the substance of all the evidence as to the circumstances under which this paper came to the hands of the defendant. We need not say more than that, instead of conclusively establishing, as the court found, that "the *plaintiff* delivered the said order *for acceptance* to the defendant," it quite as much tends to show the contrary, namely, that the drawer, with consent of plaintiff, sent it as a voucher for money expected to be remitted to that corporation and by it paid over to plaintiff. There is no particle of evidence to establish existence of any communication or circumstance which could suggest to defendant that plaintiff sent it or authorized its sending, that any acceptance was demanded or expected, or that plaintiff's relations with the drawer would be affected by silence.

If, however, both of these questions could be answered in the affirmative, there would still remain the question of fact whether defendant's conduct was such as to warrant inference or implication of acceptance. There is no direct evidence of anything except long-continued retention of the draft, and no evidence that any demand was ever made, either for decision as to acceptance or for return. The court sought to meet this question by its finding that defendant destroyed the draft. Of this there is no direct proof, the sole evidence on the subject being that of defendant's agent that he had no recollection about it, and did not know whether or not it was among papers in defendant's Chicago office. Whether this might have warranted the jury in so doing, it certainly was not so wholly inconsistent with any other as to require the court to raise the inference of destruction as matter of law.

Hence we must conclude that there were at least three questions of fact on which the jury were not permitted to decide, as to which the evidence and inferences were not beyond controversy, at least in favor of plaintiff. Whether there was any evidence to support such a decision we need not decide, for there was no motion, after verdict, for judgment in defendant's favor. A new trial must, therefore, be directed.

As a guide to the court and parties upon such new trial it seems important that we declare whether the instrument in suit is within the purview and control of our negotiable instrument law, above cited. Whether such paper continues to be a bill of exchange in pursuance of our earlier decisions (*Mehlberg v. Tisher*, 24 Wis. 607; *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724), it certainly is not a negotiable bill within the definition of sec. 1680, Stats. 1898, as amended by ch. 356, Laws of 1899, which requires that such an instrument shall be payable to order or bearer. It seems clear from the title that the codifying law of 1899 is intended to regulate only negotiable instruments. Selover, Neg. Inst. Laws, § 2. It therefore does not affect or control the rights of the parties upon this paper.

Judgment reversed, and cause remanded for a new trial

SECTION XI—CONTRACT OF THE VENDOR—WARRANTIES OF
QUALIFIED INDORSER AND TRANSFERER BY DELIVERY. § 67.

Hannum v. Richardson (1875), 48 Vt. 508, 21 Am. Rep. 152.

Assumpsit for false warranty of a promissory note. Plea, the general issue, and trial by jury, December Term, 1874, BARRETT, J., presiding.

Said note was for \$58, dated Aug. 6, 1870, payable to the order of one McIntosh & Co. 30 days after date, signed by one Lincoln, indorsed by the payees to defendant, and by defendant to plaintiff without recourse to the payees or the defendant.

J. F. Deane and *M. P. Sawyer*, for defendant.

Walker & Goddard, for plaintiff.

The opinion of the court was delivered by

PIERPOINT, Ch. J. It may be observed in the outset, that this action is not brought by the plaintiff as the indorsee of the note referred to against the defendant as the indorser, and the action is not based upon the indorsement, but is brought upon an alleged warranty by the defendant that the note was a valid and binding note, based upon a valid and lawful consideration, when in fact it was given for an illegal consideration, and was at its inception void. On trial the plaintiff introduced evidence in support of his declaration. After the evidence was in, the defendant insisted that as it appeared from the note that it was indorsed by the defendant "without recourse," the legal effect of the indorsement could not be varied or controlled by evidence outside of the indorsement itself—that the same was conclusive in that respect; but the court held that such indorsement was not of itself conclusive of its legal effect in such sense as to exclude the evidence *aliunde*; and submitted the case to the jury in accordance with such ruling, and it is upon this decision and the charge of the court in respect to it, that the only question that has been raised and discussed by the defendant's counsel arises.

What would have been the effect of this objection if the action had been based upon the indorsement, it is not necessary now to inquire. By indorsing the note "without recourse," the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that in respect to such liability, it may perhaps be regarded as standing without

an indorsement. If it is to be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled, that where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time; and in such case, knowledge on the part of the seller is not necessary to his liability. The implied warranty is, in this respect, like an express warranty, the *scienter* need not be alleged or proved. Edwards, in his work on Bills and Promissory Notes, 188, says: "One who transfers a negotiable instrument by delivery or by indorsement, impliedly guarantees that it is genuine, and that he has title to it. The rule is the same in regard to personal property. The vendor of a chattel always gives an implied warranty of the title. (15 Johns. 240; 6 Cow. 484; 4 Duer, [N. Y.] 191; 6 Johns. 5). Though the indorser transfers the note upon condition that it is to be collected at the risk of the indorsee, he is, nevertheless, responsible if the note proves to be a forgery." (Edwards, 289).

In this case the note in question was given for intoxicating liquor sold in this state in violation of law, and therefore was void at its inception; in short, it was not a note, it was not what it imported to be, or what it was sold and purchased for; it is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his fifty dollars. In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand.

The plaintiff has declared as upon an express warranty. If he could prove one, very well; if he could not, the implied warranty is just as available to him, the declaration being according to its legal effect.

This view of the case relieves it from all embarrassment growing out of the question as to the admissibility of parol testimony to vary the indorsement, as the effect of the indorsement is really not involved in the case. And the ruling and charge of the court were really more favorable to the defendant than he had the right to ask.

The exceptions to the overruling of the motion in arrest were waived. The exceptions to the refusal to set aside the verdict as against the evidence, this court refuses to hear, the decision of the County Court being conclusive in such cases.

Judgment affirmed.

Challiss v. McCrum (1879), 22 Kan. 157, 31 Am. Rep. 181.

Error from Atchison District Court.

McCrum sued Challiss to recover the sum of \$229.60, with interest thereon at seven per cent. per annum, from December 10th, 1875, alleged to be due plaintiff on a certain promissory note by defendant, indorsed without recourse, and transferred to plaintiff. At the March Term, 1878, of the district court, the defendant Challiss interposed a general demurrer to the petition, which was overruled, and to review this ruling the case is brought here. All necessary facts appear in the opinion.

W. W. Guthrie, for plaintiff in error.

W. D. Webb, for defendant in error.

The opinion of the court was delivered by

BREWER, J. On December 4, 1871, plaintiff in error loaned one Edward A. Ege \$250, and took his note therefor in the sum of \$265, payable to Richard Probasco or bearer, and secured by mortgage. Long after its maturity, and in 1876, several payments having been made thereon in the meantime, plaintiff in error sold the note for its then face value to defendant in error. At the time of such sale he indorsed it, "Without recourse.—W. L. Challiss." McCrum sued on the note. Ege plead usury. The plea was sustained, and McCrum recovered \$229.90, less than the face value of the note, for which sum he brought this action. A demurrer to the petition was overruled, and this ruling is now presented for review. Can the action be sustained? Of course no action will lie on the indorsement, for by his written contract Challiss expressly declines to assume the liabilities of an indorser. If sustainable at all, it must be as against him as a vendor, and not as an indorser, and upon the doctrine of an implied warranty. The theory of the defendant in error is, that every vendor of a bill, bond or note impliedly warrants that it is what it purports on its face to be—the legal obligation of the parties whose names appear on the instrument; and that the character of the indorsement or the lack of an indorsement in no manner affects this implied warranty. On the other hand, the counsel for plaintiff in error lays down the broad proposition that "there is no such thing as implied warranty in the sale of chattels;" and that, in the absence of express warranty, the maxim *caveat emptor* is of universal application. It is clear that the character of the indorsement cuts no figure in the question; as stated, no action

will lie on it. But further, the restriction is only as to his liability as indorser, and in no manner affects his relation to the paper as vendor. An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer, and is liable on the default of the drawee. "Without recourse," does away with this conditional liability. It leaves the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves him a vendor, and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery. (*Hannum v. Richardson*, 48 Vt. 508). Independent, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: First, that there is an implied warranty of the genuineness of the signatures; and second, that there is no warranty of the solvency of the parties. It is unnecessary to more than refer to a few of the authorities upon these propositions: Byles on Bills, pp. 123, 125, and cases in notes; *Jones v. Ryde*, 5 Taunt. 488; *Gurney v. Womersley*, 4 El. & Bl. 132; *Gompertz v. Bartlett*, 24 Eng. Law & Eq. 156; *Terry v. Bissell*, 26 Conn. 23; *Merriam v. Wolcott*, 3 Allen, 259; *Aldrich v. Jackson*, 5 R. I. 218; *Loddell v. Baker*, 3 Metc. 469; 1 Addison on Cont., p. 152; *Ellis v. Wild*, 6 Mass. 321; *Eagle Bank v. Smith*, 5 Conn. 71; *Shaver v. Ehle*, 16 Johns. 201; *Dumont v. Williamson*, 18 Ohio St. 515; 2 Parsons on Notes and Bills, ch. 2, § 2. But in the case at bar, the signature of the maker was genuine. The objection is, that it was never his legal obligation to the full amount for which it purported to be. How far is there any implied warranty in this respect? A reference to some of the leading cases will throw light upon this question.

In *Thrall v. Newell*, 19 Vt. 203, it appeared that one of the makers of a note was insane. The vendor made a written assignment, in which was a description of the note, and the court construed this as an express warranty that the instrument was the legal obligation of the apparent makers, and one being incapable of contracting, gave judgment against the vendor on account of this breach for the amount received by him. While the judgment of the court is rested upon the fact of an express warranty, the judge who writes the opinion expresses his individual conviction that the same result would follow on a mere transfer without any express warranty, and quotes approvingly an extract from Rand's edition of Long on Sales, that "there is an implied warranty in every sale that the thing sold is that for which it was sold."

In *Lobdell v. Baker*, 3 Metc. 469, it appeared that the owner of a note procured the indorsement of a minor, and then put the paper in circulation. He was held liable to a subsequent holder. Chief Justice Shaw, delivering the opinion of the court, says:

"Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties, but he has a legal right to believe, without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe, upon the faith of the security itself, that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports."

In *Hannum v. Richardson*, 48 Vt. 508, a note was given for liquor sold in violation of law, and was by statute void. Defendant knew its invalidity, transferred it by an indorsement without recourse, and he was held liable to his vendee.

In *Delaware Bank v. Jarvis*, 20 N. Y. 226, a usurious note was sold, and the vendor was adjudged liable, not merely for the money received by him, but also the costs paid by his vendee in a suit against the makers of the note. In the opinion, Mr. Justice Comstock uses this language:

"The authorities state the doctrine in general terms that the vendor of a chose in action, in the absence of express stipulation, impliedly warrants its legal soundness and validity. In peculiar circumstances and relations, the law may not impute to him an engagement of this sort. But if there are exceptions, they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case, the defendant held a promissory note which was void, because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs and received the cash therefor, by that very act he affirmed in judgment of law that the instrument was unattainted so far at least as he had been connected with its origin."

In *Young v. Cole*, 3 Bingham (N. C.), 724, certain bonds were sold as Guatemala bonds, which turned out afterward to be lacking the requisite seal, and the vendor, though ignorant of the defect and innocent of wrong, was compelled to refund the money. The thing in fact sold was not the thing supposed and intended to be sold.

In *Gompertz v. Bartlett*, 24 Eng. Law and Eq. 156, the plaintiff discounted for the defendant an unstamped bill, purport-

ing on its face to have been a foreign bill, drawn at Sierra Leone and accepted in London, but which was in fact drawn in London. If actually a foreign bill, it required no stamp, and was valid; but being an inland bill, it required a stamp to make it a valid bill in a court of law. The acceptance was genuine, and the acceptor had previously paid similar bills. But the acceptor becoming bankrupt, the commissioner refused to allow it against his estate because not stamped. Thereupon plaintiff, who had sold the bill, and been compelled to take it up, brought his action to recover the price he had paid for it, and the action was sustained. Lord Campbell, before whom the case had been tried, and who then held adversely to the plaintiff, said:

"I then thought that the rule *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and upon this ground: that the article sold did not answer the description under which it was sold. If it had been a foreign bill, and there had been any secret defect, the risk would have been that of the purchaser; but here it must be taken that the bill was sold as and for that which it purported to be. On the face of the bill it purported to be drawn at Sierra Leone, and it was sold as answering the description of that which on its face it purported to be. That amounted to a warranty that it really was of that description."

In *Ticonic Bank v. Smiley*, 27 Me. 225, an overdue note was transferred with this indorsement, "Indorser not holden;" yet it was decided that the indorser was liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it of which the note gave no indication and the vendor no information.

In *Snyder v. Reno*, 38 Iowa, 329, it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The court says: "We have no doubt that there is an implied warranty of the transferrer that there is no defect in the instrument, as well as that the signature of the maker is genuine." See, also, *Blethen v. Lovering*, 58 Me. 437; *Ogden v. Blydenburgh*, 1 Hilton, 182; *Fake v. Smith*, 2 Abb. (N. Y.) App. 76; 2 Parsons on Notes and Bills, ch. 2, § 2, and cases in notes; *Terry v. Bissell*, 26 Conn. 23; 1 Daniel on Neg. Instruments, § 670. In this, the author thus states the law: "When the indorsement is *without recourse*, the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it

purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse; but who is nevertheless liable if he draws upon a fictitious party, or one without funds. And, therefore, the holder may recover against the indorser *without recourse*, (1) if any of the prior signatures were not genuine; or, (2) if the note was invalid between the original parties, because of the want, or illegality, of the consideration; or, (3) if any prior party was incompetent; or (4) the indorser was without title.”

These authorities fully sustain the ruling of the district court. The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as it were no note. This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof.

The suggestion of counsel that the change in the usury law, by the legislation of 1872, affected the right of recovery upon the note, has been already decided adversely, in the case of *Jenness v. Cutler*, 12 Kas. 500.

The judgment will be affirmed.

All the justices concurring.

Littauer v. Goldman (1878), 72 N. Y. 506.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order affirming an order of Special Term, which overruled a demurrer to the complaint herein. (Reported below, 9 Hun, 231).

The complaint alleged, in substance, that defendant sold and transferred by delivery to plaintiff, for valuable consideration, a promissory note, which was void for usury in its inception; that plaintiff sued the makers, who interposed the defense of usury; that plaintiff notified defendant of the bringing of the action and of the defense set up, and requested him to take charge of the prosecution of said action and that he would be held liable in case the defense was sustained; that plaintiff was beaten in said action and a judgment for costs rendered against him. It was not alleged that defendant had knowledge of the defect or that

any express representation or guaranty was made. The defendant demurred that the complaint did not state facts sufficient to constitute a cause of action.

E. H. Benn, for appellant.

B. W. Huntington, for respondent.

MILLER, J. The right of the plaintiff to maintain this action rests upon the ground that the note in question which was sold and transferred by the defendant to the plaintiff was invalid and void, by reason of its original usurious consideration. It is alleged that, being in violation of the statute against usury, it was no note, and by implication of law the defendant did warrant and undertake that the same was not usurious or illegal, but a valid and legal note. The complaint does not allege that the defendant had any knowledge of the usury or was a party to the same, but states that the seller by the act of transfer for a valuable consideration, impliedly warranted that the paper was genuine and all that it purports to be upon its face, and incurred an obligation by the sale to make the paper good, although he did not indorse or guaranty the same. The question whether an action will lie for the loss sustained by the plaintiff by reason of the note being usurious, and the recovery of the amount thereof thereby defeated, has never arisen under the precise circumstances presented in this case, and demands an examination of the principle applicable to the contract entered into upon the sale of paper of this description, and of the authorities bearing upon the subject. The rule is well-settled that generally one who transfers paper by delivery only, incurs none of the liabilities which attach to an indorser, for the reason that the irresistible inference is, that if he transfers it and it is received without his indorsement, that such liabilities did not enter into the bargain or the intention of the parties. This rule, however, is not without exception, and the transferrer of notes or bills by delivery warrants the genuineness of the signatures, and that the title is what it purports to be. If the paper is forged the transferee is liable upon the original consideration which has never been extinguished by the sale. (2 Parsons on Contracts, 37, 38). So, also, it is laid down by the same author that the vendor without indorsement warrants that the paper is of the kind and description that it purports to be, and there is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability, and the assignment of a bill or note for a valuable consideration raises an implied warranty that the assignor has

done nothing, and will do nothing to prevent the assignee from collecting it. The reason given as to forged paper is that it is nothing, and the one who has transferred it has transferred nothing, and is therefore liable. (Id., 39, 40). The question whether paper tainted with usury, which is transferred by the holder without knowledge of this defect, can be regarded as within the principle of the exceptions stated, is not free from difficulty, and at first view there appears to be some ground for claiming that a note made in violation of a statute which declares usury to be a misdemeanor, and that all paper of this kind shall be void, should stand on the same footing as forged or other paper, which is excepted from the general rule.

Although the reported cases do not decide the exact point, an examination of some of the leading authorities tends to throw some light on the subject. In *Marvin, Prest. of the Delaware Bank v. Jarvis* (20 N. Y., 226), a note was transferred to the plaintiff which had been taken at a usurious premium by the defendant and the avails received by him. Upon being sued, the defense of usury was interposed, which was successful, and the bank sued the defendant to recover the amount and costs of prosecuting the note. It was held that one who transfers a chose in action impliedly warrants that there is no legal defense to its collection arising out of his own connection with its origin, and that the party accepting the transfer is at liberty to act upon the implied assertion of the validity of the paper, and to bring an action for its collection; and when defeated to recover the costs incurred by him from his assignor. The opinion lays down the rule that the authorities hold the doctrine in general terms that the vendee [vendor?] of a chose in action, in the absence of express stipulations, impliedly warrants its legal soundness and validity, and that exceptions do not exist when the invalidity of the debt or security sold arises out of the vendor's dealing in relation to it. It is also said that the act of transferring the note was the strongest possible assertion that no legal defense existed. The defendant in the case cited had knowledge of the usury, which was not the fact here, and hence it differs from the case at bar, and is not decisive of the question; but the opinion is very strong in upholding the general doctrine referred to where there is a radical defect in the note.

In *Webb v. Odell* (49 N. Y., 583), a recovery for the purchase-price was upheld where notes were sold for less than their face, upon a representation that they were business paper, when, in fact, they were accommodation notes, and thus usurious and void

in the hands of the vendee. The decision is placed upon the ground that the thing sold differed in substance from what the purchaser was led by the vendee [vendor?] to believe he was buying, and the difference was so substantial and essential in its character as to amount to a failure of consideration. The representation that the notes were business paper was an important fact, and hence the decision does not exactly cover a case where the party transferring had no knowledge of the true character of the paper. In *Ross v. Terry* (63 N. Y., 613), the defendant sold a bond and mortgage to the plaintiff, which was usurious and void. The defendant was personally concerned in the making of them, and in the unlawful acts which vitiated them, and it was held that there was an implied warranty of the validity of the securities. It will be observed that here, also, the defendant had knowledge of the usury, and hence the case is not directly in point. In *Take v. Smith* (7 Abb. [N. S.], 106), the defendants, who sold a usurious note to the plaintiff, were held liable upon an implied warranty by defendants, on the sale of the note, that there was no legal defense to an action upon it, but it appeared that the defendants were privy to the consideration of the note, and the facts and circumstances under which it was given and transferred.

The foregoing constitute the principal cases in this State which have a direct bearing upon the question arising where the notes transferred were tainted with usury. In the cases of *Whitney v. National Bank of Potsdam* (45 N. Y., 305), and *Bell v. Dagg* (60 N. Y., 530), the notes were forged, and the implied warranty related to the genuineness of the signature, which, as we have seen, is expressly provided for in the elementary works. In the case of *Gemport v. Barflett* (75 Eng. C. L. R., 849), an unstamped bill of exchange, indorsed in blank purporting to be a foreign bill, was sold without recourse by the holder. It was shown to have been drawn in the country where the parties resided, and was for that reason unavailable for want of a stamp, and it was held that the article did not answer the description of that which was sold, viz.: a foreign bill, and hence the purchaser could recover back the price from the vendor. This case sustains the doctrine that the money might be recovered as paid under a mistake of fact, which seems to have been a mutual mistake, and the whole case appears to have been disposed of upon the ground that the article did not answer the description. There is some analogy between the case last cited and the one at bar, for here the note on its face purported to be valid, and was only shown not to be by proof of extrinsic facts, which affected the original con-

sideration. The difference however is, that in the case last cited the purchaser contracted for a foreign bill which required no stamp, and did not receive what he was entitled to, while here there was a secret defect unknown to both parties, and not provided for; and as was said by the Lord Chief Justice in *Gempport v. Bartlett*: "If it really had been a foreign bill, any secret defect would have been at the risk of the purchaser." From the authorities to which we have adverted, it appears that in every case where usury was involved there was knowledge of its existence on the part of the person who held and transferred the note. It is true that in *Delaware Bank v. Jarvis* (*supra*), it is remarked by the judge that he does not consider it a material circumstance that the defendant had knowledge that the note had not been negotiated prior to the time when it was received, and as we have seen lays down the broad rule that, in any case where there is not an express agreement, the vendor of a chose in action warrants not only the title, but the soundness and validity of the note. The opinion of the learned judge is entitled to great respect; but, as the facts show it was not necessary to go to this extent to sustain the decision made, it is not entirely controlling.

It is of grave importance whether a *scienter* is material for the purpose of upholding an implied warranty in a case of this kind. In *Hoe v. Sanborn* (21 N. Y., 552), Selden, J., lays down the rule, "that whenever an article sold has some latent defect, which is known to the seller, and not to the purchaser, the former is liable for this defect if he fails to discover his knowledge on the subject at the time of the sale." He proceeds to state that where knowledge is proved by direct evidence, the responsibility rests upon the ground of fraud; but where the probability of knowledge is so strong that courts will presume its existence without proof, the vendor is held responsible upon an implied warranty; and the difference between the two cases is, that in the one, the *scienter* is actually proved, in the other it is presumed. A *scienter* is, therefore, essential to establish an implied warranty; and as we have seen, the cases to which we have referred all show knowledge on the part of the vendor. The cases which are cited to sustain the doctrine that the *scienter* is immaterial where there is a warranty either express or implied do not go to that extent.

In *Everston v. Miles* (6 J. R., 138), the action was assumpsit for a breach of warranty on the sale of a horse, and the judge upon the trial rejected evidence to show that the representations proved were false, and decided that the plaintiff must show an express warranty, otherwise they could not recover upon the declaration.

This ruling was sustained by the higher court, and it was said that there is no case which permits a plaintiff to establish deceit and fraud, when he declares only in assumpsit on a warranty express or implied. The question presented related to the form of the complaint, and has no application to the case now considered where the point is, what constitutes an implied warranty upon the sale of a chose in action. In *Ross v. Mather* (47 Barb., 582), the action was for a false warranty in the sale of a horse, and it was held it was unnecessary for the plaintiff to make proof of the *scienter*, but proof of the warranty was sufficient, and whether the defendant knew the warranty was false at the time of making it was of no importance. The warranty in the case cited was express and of course when proved made out a case. Here the question is, where there is no express warranty and the evidence does not show knowledge or deceit, whether any implied warranty is made out and the cases cited furnish no light on that subject. In *Williamson v. Allison* (2 East, 446), the warranty was proved and the same rule was laid down. The reason of the rule was stated by Lord Ellenborough to be that the plaintiff was equally entitled to recover on the same proof, by striking out the whole averment of a *scienter*. This is apparent, and hence the rule last stated has no application to a case where the warranty is necessarily dependent upon proof of knowledge. Without proof of such knowledge no warranty is made out, for there is only the naked fact that the plaintiff purchased the notes, and as we have seen there is no reported case which holds that where such purchase is made without actual knowledge by the defendant that an implied warranty is established.

It is true that some of the cases to which we have referred, hold that express representations are not necessary to establish a case and fix a liability, but in all of those where the notes were affected by usury the evidence showed that such fact was known to the defendant. The case of a forged instrument, as we have seen, rests upon a different principle, viz.: That the note is no note, and hence none of the cases cited aid the plaintiff. The doctrine that an action can be maintained to recover back the purchase-price paid under a contract of sale of personal property, without proof of warranty or fraud, where, upon delivery of the property, it proves utterly valueless, and where an offer to return has been made and refused, which is held in *Stone v. Frost* (61 N. Y., 614), is scarcely applicable to negotiable paper which must be governed by entirely a different rule. In the latter case, where the transfer is made without indorsement, it is not unreasonable

to suppose that certain liabilities did not enter into the consideration of the transfer, and had it been so intended some agreement would have been made in regard to the same.

The authorities cited in *Parsons on Contracts* (*supra*), in the note to uphold the rule stated that there is an implied warranty that the parties are under no incapacity to contract, do not sustain the doctrine laid down in the text. In *Lobdell v. Baker* (1 Met., 193; *id.*, 469), the note was indorsed by a minor, and the action was for deceit in procuring the minor to indorse it, and then putting it in circulation. Knowledge was a necessary ingredient of the plaintiff's action, and hence the case cited is not in point. In *Thrall v. Newell* (19 Vt., 202), where the note was invalid, as one of the signers of the same was insane, and had successfully defended on that ground, the case turned somewhat upon the construction to be given to a written assignment to the plaintiff, which it was held must be construed as an express warranty on the part of the defendant that it was a valid note, and that the signers were of sufficient capacity to contract, and although, in the opinion, the judge was inclined to think that there was a warranty implied by law from the sale of the note, that question was not in the case; nor do the text-books sustain the doctrine as stated in *Parsons* in reference to incapacity.

In *Story on Promissory Notes* (§ 118), it is said that the holder warrants by implication, unless otherwise agreed that he is the lawful holder and has title; that the instrument is genuine, and not forged or fictitious; that he has no knowledge of facts which prove the instrument, if originally valid, to be worthless, either by a failure of the maker, or by its being paid, or otherwise to have become void or defunct.

In *Chitty on Bills* (p. 245), it is laid down that where a person obtains money on a note, and it turns out to be forged, he is liable to refund the money to the party from whom he received it, on the ground that there is, in general, an *implied warranty* that the instrument is *genuine*. Again, at page 247, it is said: "If a man assign a bill for any sufficient consideration, *knowing it to be of no value*, and the assignee be not aware of the fact, the former would, in all cases be compellable to repay the money he had received." It is knowledge of the defect which renders the party liable for a note which is of no value, and this rule applies to a note which is tainted with usury. In *Ferns v. Harrison* (3 D. & E., 757), the same rule was laid down. In the case last cited the holder of a bill of exchange desired to get it discounted, but refused to indorse it, and delivered it to another party, who

passed it off for that purpose to a third party, informing him to whom it belonged, and such last-named party disposed of it by indorsing it, being prevailed upon to do so by the person who delivered it to him. Although the original owner afterward promised to pay the bill, it was held that such promise cannot support an action brought against him by the indorser. Lord Kenyon says: "It is extremely clear that if the holder of a bill sends it to market without indorsing his name, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counterfeit into circulation to impose upon the world instead of current coin. In this case, if the defendant had known the bill to be bad, there is no doubt that he would have been obliged to refund the money." (See, also, Byles on Bills, 158, 159; Story on Bills, § 111; Edwards on Bills, 191).

In *Lambert v. Heath* (15 M. & W., 485), the defendant, a share broker, bought for the plaintiff script certificates, which were sold in the share market, at a premium, as "Kentish Coast Railway Script," and were signed by the secretary of the railway company. The genuineness of the script was denied afterwards by the directors, who alleged that it was issued without authority. In an action brought to recover back the price on the ground that it was not genuine, it was held that it was a proper question for the jury whether what the defendant intended to buy was that which was sold in the market as such script. Alderson, B., said: "It appears that it was signed by the secretary of the company; and if this was the only Kentish railway script in the market, as appears to have been the case, and one person chooses to sell and another to buy that, then the latter has got all he contracted to buy." The script was of no value, because it was not genuine, as the note here is worthless, by reason of the usury. The same principle is applicable in both cases, and the plaintiff cannot recover unless it is made to appear that the plaintiff intended to purchase and the defendant to sell the note without the alleged defect.

In *Hall v. Conder* (26 L. J. [C. P.], 138), an action was brought to recover money agreed to be paid upon the sale of an interest in a patent right. One of the pleas interposed to the declaration was, that the invention was not new in England, and was worthless, and the plaintiff was not the first inventor. To that there was a demurrer, and it was held that there was in the agreement no warranty, express or implied, that the patent was

indefeasible, and no fraud being alleged, and the defendant having the same means of knowledge as to the novelty and value of the patent as the plaintiff, the plea was bad. The rule is laid down by Caswell, J., that on the sale of a known ascertained article, there is no implied warranty of its quality.

The examination we have made of the question shows that the law in regard to the transfer of negotiable bills of exchange and promissory notes, as laid down for a century or more, only excepts two cases as coming within the doctrine of an implied warranty, viz.: a warranty of title, and that the instrument is genuine and not forged. There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that is an implied warranty of the validity of the note. To uphold such a doctrine would be an innovation upon a settled principle of law and the establishing of a new and different rule from that which has governed the sale and transfer of this species of property for a long period of time. It is at least exceedingly doubtful whether it would be expedient to inaugurate a new and questionable rule of conduct for the government of transactions of this description, even if the law permitted it to be done. The hardship which may fall upon the plaintiff by the purchase of the paper in question may operate quite as harshly on the defendant, as the assumption is that he had no knowledge of the inherent vice which affected the note. It is difficult to apply the rules of law in all cases with exact justice. In fact, if the rule be as the authorities hold, and as should be if it is not well understood, that the purchaser of paper of this description takes it at his own hazard and risk without any warranty, unless he chooses to require such an indemnity and makes it a part of the contract, no serious inconvenience or injury can follow. The doctrine of *caveat emptor* applies, and the fault is with the person who fails to exact a warranty, if it turns out that he has been mistaken or has unfortunately made an unprofitable or a bad bargain. Neither party has any just ground of complaint in such a case.

The result is that the judgment was wrong and must be reversed, with leave to the plaintiff to amend his complaint upon the usual terms in such cases.

All concur, except EARL, J., dissenting.

Judgment accordingly.

Erwin v. Downs (1857), 15 N. Y. 575.

Appeal from the Supreme Court. The defendant was sued, as the endorser of two promissory notes, signed Waller & Burr, for the payment of \$150 each, to the order of the defendant. The action was tried before a referee, who found, as facts, that Waller & Burr were two married women, viz., Rachel M. Waller and Henrietta Burr, doing business as a mercantile firm in the city of New York. That the promissory notes were signed by said Henrietta Burr, in the name of Waller & Burr, and were endorsed by the defendant, for the benefit and accommodation of Waller & Burr, and for the business carried on by them; that said notes were transferred to the plaintiff before maturity, for a full and valuable consideration, but with the knowledge that the names of Waller & Burr, signed to the notes, were those of two married women. He further found that when the notes became payable, the presentation was made at the place of business of the said firm of Waller & Burr, to Mrs. Burr, and payment thereof refused, but in the absence of Mrs. Waller; and notice of non-payment was duly served on the defendant. The referee reported that the plaintiff was entitled to judgment, and the Supreme Court, at general term in the first district, affirmed the judgment rendered on his report. The defendant then appealed to this court.

S. F. Clarkson, for the appellant.

Levi S. Chatfield, for the respondent.

SHANKLAND, J. The note was void, as against the makers, because they were married women, and incapable of contracting obligations in that form. But when the defendant endorsed the note, he impliedly contracted that the makers were competent to contract, and had legally contracted, the obligation of joint makers of the note. He also assumed the legal obligation, in most respects, of the drawers of the bill. The fact, known to the plaintiff at the time he took the note, that the makers were married women, did not deprive him of the character of a *bona fide* purchaser. Nor does the payee's knowledge that the drawee is a married women, discharge the drawer in case of non-payment of the bill by the drawee. Nor is the endorser discharged, though the name of the maker is forged. (1 Comst., 113). The fact is not found that the plaintiff was aware the note was accommodation paper. The plaintiff was a *bona fide* purchaser within the law merchant. Neither the complaint, nor the finding of the ref-

eree, tell us who transferred the notes to the plaintiff. The legal presumption is, that he received them from some legal holder in due course of business.

The judgment should be affirmed.

BROWN, J., delivered an opinion to the same effect.

All the other judges concurring.

Judgment affirmed.

Brown et al. v. Montgomery et al. (1859), 20 N. Y. 287, 75 Am. Dec. 404.

Appeal from the Superior Court of Buffalo. The plaintiffs sued to recover the amount of a note for \$297, made April 11, 1856, by the defendants, payable presently. The defence was fraud in the consideration of the note.

On the trial, before a jury, the following facts appeared in evidence: At the date of the note, the plaintiffs were the holders of a check drawn by Farnham, Smedley & Kendall, on the Bank of Attica, payable to the order of and indorsed by L. R. Farnham, one of that firm, for \$300, post-dated as of April 16, 1856. On that day (April 11), the plaintiffs employed one Cutting, a bill broker, to sell the check, authorizing him to allow not exceeding \$4 discount. Cutting, on the same day, sold it to defendants for \$297, for which he received the note sued on. The drawer and indorser of the check failed on the same day, and when it matured the defendants caused it to be presented at the Bank of Attica for payment, which being refused, notice was given to the plaintiffs. The defendants offered to deliver up the check to the plaintiffs, and required their note to be returned, but this the plaintiffs refused; and the defendants again offered the check to the plaintiffs on the trial.

Cutting, who was examined by the defendants, swore that the check was handed to him by the plaintiffs in the afternoon, and that before selling it to the defendants, he offered it to Mr. Chard, who declined to purchase it, and said that he had one drawn and indorsed by the same parties, which had that day been protested for non-payment, and he showed the protested check to the witness. The witness and Chard talked about the different members of the firm, and Chard said he considered them perfectly good. The witness then went directly to the defendants, and sold them the check as above mentioned, without saying anything about the protested check or his conversation with Chard. Mont-

gomery, who transacted the business for the defendants, said he considered the check good, and took it readily.

It appeared that the drawers of the check kept an account at the Bank of Attica, and were wholesale merchants, in good credit and standing, until that day, when they stopped payment; and their checks to a considerable amount, including the one mentioned by Chard, were refused payment on that and the succeeding days, and remained unpaid at the time of the trial. Some of them were post-dated like the check in question. The defendants' business was buying and selling negotiable paper and dealing in uncurrent money. The transaction took place in Buffalo, where all the parties lived.

The court charged the jury, that the non-payment and protest of the check, on the 11th April, was evidence tending to show insolvency in the drawers; that it was the duty of Cutting to communicate to the defendants what he had heard Chard say about the protest of that check, without regard to what he may have thought about the solvency of the drawers; and if he did not do so, and they were really insolvent, the plaintiffs could not recover on the note. The plaintiffs' counsel excepted to both branches of the charge. There was a verdict and judgment for the defendants, which was affirmed at a general term. The plaintiffs appealed.

Amasa J. Parker, for the appellants.

Lorenzo K. Haddock, for the respondents.

DENIO, J. I think there is no error in the charge to the jury in the Superior Court. The law unquestionably is, as it was assumed on the argument, that notice to the plaintiffs' agent, Cutting, while he was actually engaged in attempting to sell the check, of the failure of the drawers, was equivalent, so far as the present action is concerned, to notice to the plaintiffs themselves.

What Chard informed him, was not precisely that Farnham & Co. had failed, but that their check on the bank at which they kept their account was that day protested for non-payment. This, *prima facie* was notice that they had suspended payment; for when a business man in a commercial town fails to meet his paper, payable at a bank, and especially his checks upon the bank at which he keeps his account, the natural inference which every one draws is, that he is no longer able to pay his debts. Such a circumstance may occur from oversight or accident, but those are exceptional cases. The failure to meet the paper is itself a suspension of payment, and notice of such a fact, unaccompanied with any explanation which would give it a different character,

is notice of the commercial failure of the party. That it was so understood by Cutting and Chard is evident from the fact that they speculated upon the question, whether the members of the firm drawing the check would ultimately be able to pay. Upon that question, Chard, as a creditor is apt to do, took the most favorable view. It is apparent that neither of them expected the check to be paid on presentation when it should mature, five days afterwards. The Superior Court considered that the confidence which Chard expressed in the ultimate solvency of the members of the firm, did not relieve Cutting from the duty of communicating to the defendants the fact that its check had not been met. I am of the same opinion. Up to that time the drawers were in good credit, and their paper of this kind, we are to presume, was promptly met. Thereafter, the holders of such paper were to be put upon their legal diligence in the courts, with a fair expectation, perhaps, that they might ultimately be able to obtain payment. The difference between a bank check having five days to run, and which is then to be paid, and a suspended debt against parties who have failed, is sufficiently obvious. The defendants purchased this check as one of the former class, while the plaintiffs' agent well knew that it belonged to the latter, and withheld that knowledge from the defendants. The plaintiffs' conduct is less censurable, morally, than it would be had it been proved that they personally knew of the failure of the drawers; but in point of law, the case is the same as though, after hearing that Farnham & Co. had failed, they took the paper which they held against them into the street, and sold it to parties who had not heard of that event. Such an act could not be justified at law any more than in the forum of conscience. The judge was therefore perfectly correct in instructing the jury, that it was the duty of Cutting to communicate to the defendants what he had heard Chard say as to the protest of the other check. He was also correct in advising them that the consequence of omitting to do so was, that the plaintiffs could not recover on the note. Where a party negotiates commercial paper, payable to bearer, or under the blank indorsement of another person, he cannot be sued on the paper because he is not a party to it; but he nevertheless warrants that he has no knowledge of any facts which prove the paper to be worthless, on account of the failure of the makers, or by its being already paid, or otherwise to have become void or defunct; for, says Judge Story, any concealment of this nature would be a manifest fraud. (Story on Prom. Notes, § 118).

The plaintiffs' counsel argued that, according to the case of *Nichols v. Pinner* (18 N. Y., 295), the plaintiffs and their agent were warranted in maintaining silence as to the failure of Farnham & Co., though they knew it and the defendants did not. But the cases are essentially different. There we decided, that where a merchant, knowing himself to be insolvent, purchases goods without disclosing the fact, there being no inquiry made, he is not necessarily guilty of fraud, as he may honestly believe that he can go on and retrieve his affairs. Where so much of the trade of the country is conducted without invested capital, or on borrowed capital, it must often happen that a merchant who is ultimately successful has known periods of commercial disaster when his property would not pay his debts. It would be too strict to hold, that under such circumstances he must in all cases go into liquidation, or expose himself to probable bankruptcy by disclosing his condition. But the case does not countenance the position, that a dealer who has been of known standing, but who has suddenly failed in business, can go to those who were acquainted with his former character, but who have not heard of his failure, and innocently purchase their property on credit. Judge Selden, in his opinion, puts that case as one not covered by the judgment.

The judge was also right in stating to the jury, that the non-payment of the check, spoken of by Chard, was evidence upon the question of the insolvency of the drawers. I have already stated what I consider the necessary inference from such a circumstance among business men. The judgment must be affirmed.

JOHNSON, Ch. J., COMSTOCK, GRAY and GROVER, Js., concurring.
Judgment affirmed.

SECTION XII—CONTRACT OF ACCOMMODATION PARTIES. § 31.

National Citizens' Bank v. Toplitz (1903), 81 App. Div. 593, 81 N. Y. Supp. 422.

Appeal from Trial Term, New York county.

Action by the National Citizens' Bank of the city of New York against Emma Ida Toplitz. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before VAN BRUNT, P. J., and HATCH, PATTERSON, O'BRIEN, and INGRAHAM, JJ.

R. L. Sweezy, for appellant.

Charles Blandy, for respondent.

PATTERSON, J. On the 26th of December, 1899, the defendant made her promissory note, by which she promised, five months after date, to pay to the order of L. Toplitz, Son & Co. \$5,000 at the Chemical National Bank, N. Y., for value received. The note was indorsed by L. Toplitz, Son & Co., and was discounted by the Ninth National Bank, to the rights of which bank the plaintiff has succeeded by consolidation of the two corporations.

This was an accommodation note, and when it was discounted by the Ninth National Bank that bank had full notice that it was an accommodation note. It was not paid at maturity, and at the request of the indorsers, for whose benefit it was discounted, the time of payment was extended without the knowledge of the maker. The complaint is in the usual form of an action upon a promissory note against the maker, with an admitted credit of \$1,000 paid on account. The answer sets up that the note was delivered as an accommodation note for the express purpose of having the same discounted by the Ninth National Bank of the city of New York, and upon the distinct understanding that at its maturity it should be taken up and paid by the indorsers, and that subsequent to the delivery of the note the Ninth National Bank had knowledge that it was given for accommodation, and that after its maturity the Ninth National Bank, without the knowledge or consent of the defendant, entered into an agreement by which it extended the time of payment of the note, and that for a certain fixed time it would not collect or enforce payment thereof.

When the case came on for trial, the facts set up in defense were admitted; and the simple question arising was whether, as to the plaintiff in the action, the defendant, the maker of the note, stood in the attitude of a surety, and was released from her obligation as maker of the note by reason of the extension of the time of payment given to the person for whose benefit the note was discounted, without her knowledge or consent. The trial judge held that the facts thus set up did not constitute a defense, and that the defendant was primarily liable as the maker of the note, notwithstanding the extension of the time of payment. In this ruling the trial court was right. Concededly, this was an accommodation note. It was given with the intention that the indorser should raise money on it on the liability of the maker, and the maker is liable primarily notwithstanding the knowledge of the holder that she was an accommodation maker only. Section 55, Negotiable Instrument Law (Laws 1897, p. 728, c.

612). This note was discounted on the credit of the maker, whose very purpose was to become absolutely liable. Thus she became primarily liable. There is no relation of surety. By section 3 of the statute relating to negotiable instruments, the person primarily liable is the one who by the terms of the instrument is absolutely required to pay the same, and all other persons are secondarily liable. No other question of liability can arise in this case than such as appears upon the face of the instrument. The case is entirely unlike that of *Grow v. Garlock*, 97 N. Y. 81, in which it was held, as between two debtors standing to each other in the relation of principal and surety, and the fact being known to a creditor, that creditor was bound to respect such relationship, no matter how or when it arose, or whether he consented to it or not. But the present case, if not determinable by the ordinary rules relating to negotiable paper, is controlled by the third section of the negotiable instrument law. The note was made by the defendant in order that the indorsers might receive money upon her credit. That is the very essence of an accommodation note. That credit was given, and the indorsers received the money. The maker was thus a principal debtor. She lost nothing by the extension of time to the indorser, for she had no right of action on the note itself as against the indorsers. She could not sue them on the note, and she lost nothing of her claim against them, for by paying the note at any time she could have maintained her action to recover from the indorsers notwithstanding the extension of the time of payment of the note by the bank. On the note itself the maker never could recover against the indorsers. It may be evidence of an indebtedness of them to her, the circumstances under which it was made being shown; but the liability of the indorsers to the maker would arise, not on the note, but out of the original credit given for their benefit, and her payment of money on their behalf.

The verdict for the plaintiff was properly directed, and the judgment should be affirmed, with costs. All concur.

Maffat v. Greene (1898), 149 Mo. 48.

Appeal from St. Louis City Circuit Court. Hon LEROY B. VALLIANT, Judge.

D. D. Fassett, for appellant.

Smith P. Galt, for respondent.

GANTT, P. J.—This was an action on the following promissory note:

"\$3,218.

ST. LOUIS, MO., Feb. 20, 1893.

"Four months after date I promise to pay to the order of Domestic Sewing Machine Co., thirty-two hundred and eighteen dollars at their office, 853 Broadway, New York. Value received.

"Due June 20th, 1893.

"E. L. GREENE."

Indorsed:

"No. 28,942.

"E. L. Greene.

3457

June 23.

"\$3,218. Due June 20-23. Payable at 853 Broadway, New York. Domestic Sewing Machine Co., David Blake, V. P. D. Hutchinson, S. M. Jones, Jannette P. Moffat.

"Pay Chemical National Bank, New York City, or order for collection for account of Braddock National Bank, Braddock, Penn., John Kelly, Cashier."

Protested June 23, 1893, at the request of the Chemical National Bank, for failure to pay.

The plaintiff as indorser, having paid said note after its dishonor, sued the defendant as maker in the circuit court of St. Louis.

The answer admits the execution of the note and the various indorsements, and then proceeds to aver that defendant was merely an accommodation maker of said note for the Domestic Sewing Machine Company without any consideration therefor, of which plaintiff and the other indorsers and holders had notice, and for further answer defendant says that the plaintiff is a partner of said S. M. Jones in said petition named, and was such partner at the time said note came into the possession of said Jones and the plaintiff, and that plaintiff and said Jones have in their possession, or said Jones has in his possession for plaintiff's benefit, with her consent, a large amount of property of the Domestic Sewing Machine Company, placed in their or his hands by said company for security to them or her for the payment of

the note in this case sued on; that said property so held by them or him is of the value of at least \$100,000. That they have realized, or he has realized for her benefit, in cash, from part of the property so held by them, or him as aforesaid as security as aforesaid, and now hold in cash, as defendant is informed and believes, and so charges the fact to be, more than sufficient to pay said note, according to the terms of the agreement by which said property was by said company left with them, or him as security as aforesaid, and defendant says that the same ought to be applied by the plaintiff and said Jones to the payment of said note. Defendant says that the plaintiff, or said Jones for plaintiff, has realized as above said, if not sufficient to pay said note in full, at least a large amount that should be credited on said note. And defendant further says that it was agreed and understood between the Domestic Sewing Machine Company and said Jones and the plaintiff at the time said security was deposited with them as aforesaid, that said note would not be paid by the said Greene, and that he was not to be called upon by the plaintiff or said Jones to pay the same, but that the same should be paid out of the property so held as aforesaid by them as said security as aforesaid. Defendant further says that said Domestic Sewing Machine Company is not a resident of this state and is insolvent. And defendant further says that the plaintiff and said Jones and said Hutchinson are non-residents of the state of Missouri. That defendant is a resident of the state of Missouri. Wherefore, having fully answered, defendant says that the plaintiff ought not to have judgment against defendant, and ought at least not have judgment against him until the amount received by plaintiff, or for her benefit as aforesaid, is credited on said note, and not until said property held as aforesaid for plaintiff's benefit as security as aforesaid has been realized upon by plaintiff, and applied to the payment of said note. Wherefore, defendant prays that the court do order and decree that judgment be not entered against defendant until plaintiff has fully realized upon said security held for her benefit as aforesaid, and the cash now realized therefrom, or that may be realized therefrom, be credited on said note, and defendant prays such other and further order and decree as to the court may seem right and just.

Plaintiff in her reply denied all the new matter in defendant's answer, and proceeding, admits that said S. M. Jones had a considerable amount of property in his hands as security for the payment of the note in suit and a number of other notes to a large amount and said collaterals were placed in his hands by the

Domestic Sewing Machine Company to secure and indemnify plaintiff, Jones and Hutchinson as indorsers of said note, and sundry other notes; that Jones has realized some money out of said collaterals, but the amount is small compared to the amount of his and their liability as indorsers for said Sewing Machine Company; that they have not applied any part of said collaterals to the payment of his note; that a large portion of said collaterals is in litigation, and the right of said Jones to hold and apply them is questioned and denied, and neither plaintiff nor said Jones could safely apply the same pending said litigation. Plaintiff admits that said Jones, Hutchinson and herself are all residents of Pennsylvania and non-residents of Missouri and that the said Jones holds said collaterals in Pittsburg, Pennsylvania.

The evidence tended to prove that Defendant Greene was the agent of the Domestic Sewing Machine Company at St. Louis; that under an agreement with the company he made his accommodation notes from time to time for the use of the company under an arrangement allowing him to reimburse himself out of sales of the company's machines; that the note sued on was of this character; that at the time of the insolvency of the company his notes to and indorsements for it amounted to about \$140,000, and he held assets which amounted in his opinion to thirty-three to forty per cent of his liabilities on that account. It further appeared that after receiving the note in suit the sewing machine company sent it by George Blake, secretary of said company, to Pittsburg; that S. M. Jones was agent at Pittsburg for said company and had contracted to furnish a responsible indorser on "dealers' paper" to the amount of \$50,000; that the note in suit under this agreement was indorsed by Hutchinson, Jones and plaintiff, Mrs. Maffat, and the money procured from the Braddock National Bank of Braddock, Pennsylvania. The company having failed to honor the note, plaintiff Mrs. Maffat, paid it, and is now its holder.

At the time Mrs. Maffat indorsed the note she was not a partner of Jones and had no knowledge of the relation defendant bore to the note other than appeared from the face thereof, viz., that he was the maker, and principal debtor; she indorsed it before maturity.

On the fifth day of May, 1893, the Domestic Company assigned what is known as its Cleveland, Ohio, assets to Jones, to protect the indorsers of its paper. Jones testified he had collected a portion of these collaterals but not enough to hold himself, Hutchinson and plaintiff harmless by reason of their indorse-

ments. At the time of the trial a suit in equity was pending against Jones by another creditor for these collaterals. The receiver also claimed them.

The circuit court rendered judgment for defendant, enjoining plaintiff from prosecuting her suit at law against defendant on said notes until she account to him for collaterals she holds, or that are held by S. M. Jones or any one else for the use of the Domestic Sewing Machine Company, and apply such of the proceeds thereof as in law should apply toward the payment of said note and that she pay the cost of this suit.

Plaintiff appeals.

I. An accommodation maker of a note is in like manner a principal at common law, and liable of course to a *bona fide* holder as principal and not as surety.

"Accommodation paper stands upon grounds somewhat different from other negotiable instruments. If an accommodation bill or note is made and put into circulation, the holder who has advanced the money upon it may recover upon it against any of the parties to it, notwithstanding there was no consideration for it, as between the parties to it, and although no action could have been maintained upon it between the original parties. When paper of this kind is put in circulation it is both a request to advance the money upon it and a promise to repay the amount so advanced, and this is sufficient consideration to bind any one whose name is on the instrument as a party to it." (1 Waite's Actions and Defenses, 617.)

The holder may recover of the maker notwithstanding he knew it was accommodation paper. (1 Daniel, Neg. Inst., sec. 786; *Stillwell v. Aaron*, 69 Mo. 546; *Faulkner v. Faulkner*, 73 Mo. 338; *Miller v. Mellier*, 59 Mo. 388.)

In *Hillegas v. Stephenson*, 75 Mo. 118, it was held that where one of two accommodation signers execute a note as a joint maker with the principal debtor, and the other, as payee and indorser, and there was no special agreement between them, the former could not after paying the note call upon the latter for contribution.

No question was made that such was the law in the circuit court, nor was it denied that a creditor might proceed to judgment at law on his note before exhausting any securities he might hold, but that in such cases if the debtor desired to avail himself of such securities he must pay the note and become subrogated to the securities, but an exceedingly important modification of the general rule was announced, to wit, that if the nature of the

case was such that the debtor could not be subrogated to the securities held by or to the use of plaintiff, the plaintiff could not sue until he had first exhausted the securities.

And it was considered that because plaintiff was living in another state, and held certain collaterals in that state, her right to recover on her note in this state should be denied until she first exhausted her remedies against the collaterals.

We have been unable to find any authority for the modification thus announced, and we can not agree to it. On the contrary we understand that under the facts of this case when this note was protested and notice given to plaintiff, her liability became fixed, and when she paid it she had an absolute right to sue defendant as the maker thereof, irrespective of any collaterals she might have afterwards obtained. As to plaintiff he was the real debtor.

We do not think the authorities or sound reason go further than to hold that when a surety pays a debt for his principal he is entitled to be subrogated to the securities held by the creditor. Until payment he is not entitled to be subrogated, and his right of subrogation is to the collaterals just as he finds them. The creditor is not required to furnish his debtor with immunity from losses. The surety can only have the collaterals or other security as they actually exist with their burdens and advantages. (*Bank v. Wood*, 71 N. Y. loc. cit. 412.)

In this State from an early date it has been uniformly held that a mortgagee has three concurrent remedies. He may sue on his note, foreclose his mortgage, and bring ejectment. (*Thornton v. Pigg*, 24 Mo. 249; *Allen v. Dermott*, 80 Mo. 56.)

The circumstances that the collaterals are in another State can not affect the principal under consideration. It so happens, it is true, that in this case the collaterals are in Pittsburg, Pennsylvania, and that they are held not for plaintiff alone, but for Jones and Hutchinson, and that suits in equity are pending in the Federal courts denying the right of Jones and the plaintiff to hold them at all, and the receiver is also denying their right to collect them, but whatever the difficulties of the case, defendant can not set them up as a defense to plaintiff's action against him on his undertaking to pay this note absolutely at a certain time.

The answer only constituted a defense because it alleged an agreement between plaintiff and defendant and the sewing machine company that defendant should only be liable for a balance after crediting the collaterals, but not a word of evidence sustains this allegation. Stripped of that averment the answer

pleads no defense whatever. The testimony proved none against plaintiff, who is an innocent purchaser for value and without notice of any relation of surety and principal between defendant and the company, or any want of consideration.

If the defense relied on in this case be sustained, the doctrine that a negotiable note is a "courier without luggage" must be abandoned. It would require the plaintiff to stop, and sue Jones and abide the marshaling and adjusting of Hutchinson's, Jones's and her respective equities to the collaterals in Jones's hands, if any are left after the suit in the Federal court shall be determined against Jones. It would make defendant's promise to pay not an absolute, but a conditional one and the time of payment utterly indefinite. Commercial paper can not be subjected to such a rule without the most serious results.

The judgment should have been rendered for the plaintiff upon the pleadings and conceded facts.

The judgment is reversed and the circuit court will enter judgment for the plaintiff.

SHERWOOD and BURGESS, JJ., concur.

*The Merchants & Mfrs.' Nat. Bank v. Cumings, imp. (1896),
149 N. Y. 360.*

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 18, 1894, which affirmed a judgment in favor of plaintiff rendered upon a decision of the court on trial without a jury.

The action was brought upon a promissory note, against the maker and indorser.

The facts, so far as material, are stated in the opinion.

George H. Decker, for appellant.

Daniel Finn, for respondent.

ANDREWS Ch. J. The facts briefly are that on the 18th day of March, 1893, one John L. Cumings indorsed the note of one Joseph Cumings for his accommodation, dated on that day, for the sum of \$2,000 payable to the order of John L. Cumings three months after date, at the plaintiff's bank, where it was discounted. Contemporaneously with the indorsement, and to induce John L. Cumings to indorse the same, Joseph Cumings made his certain other note of the same date and amount, and payable at the same

time and place as the former note, to his own order, and thereupon indorsed his own name thereon and procured it to be indorsed also by the defendant. Over the indorsement on the second note was this statement: "This note is given to and to be held by John L. Cumings as collateral security for his indorsement on my note, same tenor, date and amount, favor of said John L. Cumings, which I have given to said John L. Cumings to be by him indorsed and delivered to the Merchants and Manufacturers' National Bank of Middletown, N. Y., for the purpose of renewing my note due at said bank Mch. 18th, 1893. Protest hereof and notice thereof hereby waived." This second note was thereupon delivered to John L. Cumings, who then indorsed the note first mentioned. The note discounted by the bank was not paid at maturity and was duly protested, and is still held by the bank, and is unpaid, and so far as appears no proceedings to collect it have been taken. On May 20th, 1893, before the maturity of either note, John L. Cumings, by formal written assignment, transferred to the bank the second note with all his "right, title and interest" therein. This note was also protested at maturity, and not having been paid, this action was brought thereon against the indorsers. Ira T. Cumings alone defends.

The plaintiff, among other things, relies upon the established rule in equity that a creditor is entitled to the benefit of all collateral securities or counter bonds which a principal debtor has given to a surety or a person standing in the position of a surety for his indemnity. (*Moses v. Murgatroyd*, 1 Jo. Ch. 119; *Vail v. Foster*, 4 N. Y. 312.) But in our view it is unnecessary to determine whether the present case is within this principle. Whatever right John L. Cumings had to the note in suit and to maintain an action thereon against the defendant, was acquired by the plaintiff under his assignment. If on the non-payment of the first note and the charging of John L. Cumings as indorser, the latter could have maintained an action on the second note, and have recovered the amount thereof, without having paid the first note, then we perceive no reason why he could not, by assignment of the second note to the bank which held the original note and debt, have substituted the bank in his place, and given it any right of action which he himself had or might have in case of the payment of the original note and its due protest. The character of the obligation which the defendant assumed becomes in this view a material inquiry. It turns upon the distinction between a contract to indemnify against liability, and a contract to indemnify against damage resulting from a liability. If in the present

case the undertaking of the defendant was of the former class, the action can be maintained, because the liability of John L. Cumings became fixed upon the non-payment and protest of the first note, and has not been discharged. If, on the other hand, the contract into which the defendant entered was against damage which should accrue to John L. Cumings by reason of his liability as indorser, there can be no recovery, because as yet he has suffered no legal damage. He has as yet paid nothing, and mere liability, without more, is not damage within the distinction mentioned. The distinction between the two classes is familiar, and is stated with great distinctness in *Belloni v. Freeborn* (63 N. Y. 390).

It is not always easy to determine the nature of the indemnity into which a surety enters. In the present case we have the fact that John L. Cumings refused to assume liability as indorser on the first note until the second note was given. There is the further fact, which appears in the statement on the back of the second note, that it was given as collateral security for his indorsement of the first note. There is the further significant fact that the second note was payable at a day certain, which was coincident with the day of the maturity of the first note. John L. Cumings became indorser of the first note at the request of the defendant, for such is the legal effect of the transaction. Under the circumstances it is not a reasonable construction that the security was given to protect him against the liability which he assumed, and that as between the parties the intention was to place upon the defendant and his co-indorser the burden of looking after and providing for the payment of the first note at its maturity, and, failing to do this, to create an immediate liability to John L. Cumings, by enforcing which he could, in case the bank would defer proceedings against him on his indorsement, realize the means for the payment of the original note.

In *Russell v. La Roque* (11 Ala. 352), a case nearly identical with this, it was held that the plaintiff, who, at the request of the defendant, became surety for him on a note to a third person, receiving as his indemnity the note of the defendant payable at a day certain, may sue upon it, though he had not been compelled to pay the debt for which he became surety if his liability to pay continues. In *Hapgood v. Wellington* (136 Mass. 217), the plaintiff had, at the request of the defendant, indorsed his note for his accommodation and contemporaneously therewith and as collateral security against loss on account of said indorsement the defendant gave to the plaintiff his note for the same amount.

The note indorsed by the plaintiff was transferred for value and was not paid at maturity. Thereupon the plaintiff brought suit upon the note given as indemnity and the court held that the plaintiff was entitled to recover, although payment of the other note had not been enforced and it was still outstanding and unpaid. In *Loosemore v. Radford* (9 M. & W. 657), the plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default; held, in an action on the covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages.

The question is not free from doubt, and the decisions are not altogether harmonious. See *Osgood v. Osgood*, 39 N. H. 209; *Child v. Powder Works*, 44 id. 354. The contract is ambiguous, but we think that construction which treats it as one against liability is most consistent with the admitted facts. On payment of the note the liability of John L. Cumings on the original note will be discharged and the defendant by subrogation will be entitled to enforce it against the maker.

The judgment should be affirmed.

O'BRIEN, HAIGHT and VANN, JJ., concur; GRAY, BARTLETT and MARTIN, JJ., dissent.

Judgment affirmed.

Thatcher v. The West River Nat. Bank (1869), 19 Mich. 196.

Error to Saginaw Circuit.

This was an action of assumpsit upon a promissory note brought by a corporation plaintiff, whose name was stated in the commencement of the declaration to be—"The West River National Bank of Jamaica, Vermont." The note declared on was made by E. Thatcher, the defendant below, and was payable to the order of "L. N. Sprague, Ag't." The defendant pleaded the general issue and gave notice that Sprague, the payee named in the note, was the agent of the Jamaica Leather Company, and that the note was given without consideration to the defendant, and for the accommodation of the Leather Company, of which the plaintiff had notice.

E. Thatcher, plaintiff in error in person.

W. L. Webber, for defendant in error.

CHRISTIANCY, J.—The defense relied upon by the defendant

below, without going here into unnecessary particulars, was substantially, that the note was given to L. N. Sprague, agent of the Jamaica Leather Company, (to whose order it was made payable), without consideration, and merely for the accommodation of said Leather Company, upon the assurance of Sprague that the note would be taken care of and the defendant protected; and that the bank, the endorsee and plaintiff below, received it with full notice of these facts.

The testimony of the defendant himself, and perhaps some other testimony in the cause, tended to show, that the note was given for the purpose above stated, and without consideration, and with the assurance of Sprague above stated.

But the defendant's own testimony further tended to show that the note was given for the express purpose, and with the full understanding that it was to be negotiated to the bank to enable the Leather Company to raise money upon it. It was also clearly shown by other evidence that the bank did discount the note endorsed in blank by Sprague, as agent, and paid the money for it; and there was no evidence of a contrary tendency.

We think it, therefore, wholly immaterial whether the bank had notice, or not, of the circumstances under which, and the purpose for which it was given, and of the other facts relied upon in the defense. Had the directors of the bank, knowing the nature of the previous transactions between defendant and the Leather Company, been present and heard and known the whole arrangement between Sprague and the defendant, when the note was given, the bank would still be entitled to recover. See *Charles v. Marsden*, 1 Taunt. 224; *Smith v. Knox*, 3 Esp. 46; *Thompson v. Shepherd*, 12 Met. 311; *Brown v. Mott*, 7 Johns. 361; *Lord v. Ocean Bank*, 20 Penn. St. 384; *Grant v. Ellicott*, 7 Wend. 227; *Renwick v. Williams*, 2 Md. 356; *Molson v. Hawley*, 1 Blatch. 409; *Caruthers v. West*, 11 Q. B. 143.

The want of consideration, and the assurance of Sprague that the note would be taken care of, do not affect the right of the bank as endorsee, though taking it with notice. Mere accommodation paper is generally, at least, without consideration, and such assurances, express or implied, are always given or relied upon, when such accommodation paper is given. Such facts might constitute a good defense as against the party for whose accommodation it is given; but to allow them to defeat a recovery by an endorsee who advances money upon it—when that is the purpose for which it is given—would defeat the very purpose for which such paper is made, and render the transaction absurd.

As between the defendant and the endorsee, the defendant took the risk of Sprague's assurances being made good, and his remedy is upon him or the party he represented.

These conclusions render it unnecessary to notice the defendant's request to charge with reference to the want of consideration, and the question of notice, or the charges given upon these points.

The Circuit Court was right in holding that there was no evidence tending to show that the Leather Company had any interest in the money sought to be recovered in this suit.

A copy of the note with the endorsement, accompanied the declaration, and the note and endorsement were read in evidence without objection, and no evidence was given tending to disprove the endorsement. The Court was therefore right in refusing to charge that it was necessary to prove the endorsement in any other way.

We see no error in the record, and the judgment must be affirmed, with costs.

The other justices concurred.

Whittier v. Eager (1861), 1 Allen (Mass.) 499.

Contract by the indorsee against the maker of a promissory note. Answer, that the note was an accommodation note, and that there was no consideration for the making or indorsement thereof.

At the trial in the superior court, the defendant testified that he gave the note in exchange for a note of S. W. Bean & Co., the payees, and that it was for their accommodation; that, at the time the note was signed, he proposed that they should give him their receipt, but they replied that it would be as well to give a note, which was done, and that he still held it. Upon this evidence, Brigham, J., ruled that the note declared on was not an accommodation note. The defendant's counsel then offered evidence that there was no consideration for the indorsement of the note in suit to the plaintiff, and that the plaintiff had notice of the facts above stated; and that the note had been paid to the plaintiff by some person, but by whom he was not instructed. The court rejected the evidence, and directed the jury to find a verdict for the plaintiff, which they did; and the defendant alleged exceptions.

W. L. Brown, for the defendant.

H. C. Hutchins, for the plaintiff.

BIGELOW, C. J.—The defendant by his own testimony proved that the note in suit was given for a valid consideration. Nothing is better settled than that a promissory note given by the maker in exchange for a note given to him by the payee is for a good consideration, and is in no proper sense an accommodation note, although made for the mutual convenience of the parties. (*Higginson v. Gray*, 6 Met. 212). Being a valid note on which the defendant was liable, it was wholly immaterial whether the plaintiff, as indorsee, took it for value.

If the evidence of payment was admissible, for the reason that it was not objected to at the trial on the ground that it had not been duly pleaded in the defendant's answer, it is very clear that the proof offered wholly failed to substantiate the fact. Evidence that some one had paid the amount of the note to the plaintiff did not necessarily show that the note was paid, so as to exonerate the defendant from his liability thereon. It was equally consistent with the fact of the purchase of the note by the person who paid the money, as with its payment, and the burden of proof to establish payment being on the defendant, it failed to sustain the allegations; *a fortiori* is this true, where it appears, as in the case at bar, that the defendant has not instructed his counsel that the money was paid either by himself or on his behalf. We therefore cannot see that the defendant was in any way aggrieved by the rulings of the court at the trial.

Exceptions overruled.

Am. Nat. Bank v. Junk Bros. (See page 420.)

SECTION XIII—CONTRACT OF SURETY OR GUARANTOR. § 65.

Bickford v. Gibbs et al. (1851), 8 Cush. 154.

This was an action of assumpsit on the following note:—

“July 26th, 1845. \$100. For value received, I promise to pay on demand to Joseph Bickford, or order, one hundred dollars with interest.
GEORGE MAY.”

On the back of the note was the following agreement, signed by the defendants: “We guaranty the payment of the within, waiving demand and notice.”

The writ was dated the 23d of May, 1849; and contained the money counts only. At the trial in the court of common pleas,

before Byington, J., the plaintiff put in evidence the foregoing note and agreement, and there rested his case. And the presiding judge submitted the case to the jury, with directions, if they found for the plaintiff, to cast interest on the note. The jury returned a verdict for the plaintiff; and the defendants alleged exceptions to the instructions of the judge.

This case was argued and decided at the last October term.

R. B. Caverly, for the defendants.

B. F. Butler, for the plaintiff.

SHAW, C. J.—Assumpsit to recover the amount of a note given by one May, and guaranteed by the defendants.

An exception is now taken, that this guaranty should have been specially declared on. No such exception was taken at the trial; had it been, an amendment might have been made; the objection comes too late.

The exception is also taken, that as the guaranty was a contract collateral to the note, a distinct consideration should be proved. There would be force in this objection, had the guaranty been made after the note had been made, delivered and received as a complete contract. But when the guaranty is made on the note before its delivery by the maker to the promisee, it must be deemed to be done for the benefit of the maker, to add to the strength of the note and to induce the promisee to take it and advance his money on it; and no other consideration is necessary than the credit thus given to the maker. And the guaranty being without date, and there being no direct proof of any time at which it was made, we think the court were right in leaving it to the jury, to find that the guaranty was simultaneous with the note itself. (*Benthall v. Judkins*, 13 Met. 265).

Supposing, then, that the defendants were regularly bound as guarantors, and thereby assumed an obligation somewhat differing from that of either sureties or indorsers, what was that obligation? This question has been much discussed, especially since the leading case of *Oxford Bank v. Haynes*, 8 Pick, 423. The principle to be deduced from that case, and the Pennsylvania case of *Gibbs v. Cannon*, 9 S. & R. 202, there cited with approbation and relied on, is this: That in order to maintain an action against a guarantor, a demand of payment must be made in a reasonable time of the principal, and notice of non-payment given to the guarantor; and if in consequence of want of such notice, the guarantor suffers loss, he is exonerated. (*Dole v. Young*, 24 Pick. 250). The same prompt demand and notice, as are required

to charge an indorser, are not necessary; and if the circumstances of parties remain the same, and the guarantor suffers no loss by delay, demand and notice at any time before action brought, will be sufficient. (*Babcock v. Bryant*, 12 Pick. 133). Such being the obligation of the defendants, as guarantors, they would not be liable by the general law, without proof of demand and notice. But they have expressly agreed to waive demand and notice, and *conventio legem vincit*. The effect of that waiver is, to put the plaintiff in the same situation as if he had proved that he seasonably demanded the money of the promisor, who did not pay it, and gave reasonable notice thereof to the defendants. In the absence of all proof on the part of the defendants, that they have suffered any loss by the laches of the plaintiff, the court are of opinion that this proof would entitle the plaintiff to recover.

Exceptions overruled.

Roberts v. Hawkins (1888), 70 Mich. 566.

Error to superior court of Grand Rapids. (BURLINGAME, J.)
Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Norris & Norris, for appellant.

J. C. Fitz Gerald (*Charles Chandler*, of counsel), for plaintiff.

LONG, J.—January 12, 1884, one Lyman D. Follett made his promissory note as follows:

"\$1,000. GRAND RAPIDS, MICH., January 12, 1884.

"One year after date, I promise to pay to the order of Helen M. Roberts one thousand dollars, with interest at eight per cent. per annum. Value received.

"LYMAN D. FOLLETT."

And defendant signed an indorsement on the back thereof, as follows:

"For value received, I hereby guarantee the payment of the within note.
L. E. HAWKINS."

On the delivery of this note to plaintiff, she paid Follett \$1,000. January 8, 1885, seven days before this note became due, Follett paid one year's interest; and neither at that time, nor at the maturity of the note, was the same presented to Follett or defendant for payment. No notice of non-payment was given

defendant then or at any time prior to June 8, 1887. January 15, 1886, Follett paid the interest for the next year, and January 17, 1887, for the year following. About June 8, 1887, the note being then two years and five months overdue, it was first presented to defendant, and payment demanded and refused. August 13 this suit was brought.

On the trial, plaintiff, having proved the note and guaranty, and its non-payment, rested. Defendant then sought to make his defense as pleaded, and offered to show—

1. That he was an accommodation guarantor, without consideration or security.

2. That, at or about the maturity of the note, he inquired of the maker of the note if it was paid, and was told it was.

3. That neither at the maturity of the note, nor at any subsequent time, prior to June 8, 1887, was any notice of the non-payment of this note given to defendant, nor any demand made on him for the payment thereof.

4. That at the maturity of this note, and for some considerable time thereafter,—at least a year,—Follett, the maker of the note, was solvent, and had property out of which defendant could have procured him to pay the note or obtained security.

5. That when defendant, on June 8, 1887, learned of the non-payment of this note, the maker was insolvent, out of the jurisdiction, and that he could then obtain no security or payment.

The court directed a general verdict for plaintiff on all the counts of the declaration. Judgment being entered on the verdict in favor of plaintiff for the amount of the note and interest, defendant brings the case into this court by writ of error.

The declaration contains three counts. The first alleges the guaranty, demand of the maker at maturity, non-payment, and notice of said demand and non-payment to defendant at maturity.

The second alleges the guaranty, the refusal by maker to pay at maturity, and notice to defendant, at maturity, of maker's refusal.

The third is the common counts in *assumpsit*, with copy of note annexed, and an alleged indorsement on back of L. E. Hawkins, without any guaranty over it.

The plea is the general issue, with notice of the defense of release by plaintiff's failure to give notice of non-payment to defendant, and the consequent damage and loss to him thereby.

It is claimed that the court erred in receiving the note and guaranty in evidence under the third count in plaintiff's declaration, for the reason that the note and guaranty offered were not

the note and guaranty set forth in that count; that the contract set out in plaintiff's third count was that defendant had indorsed his name in blank on the back of the note, not payable to his order; and that this would make him a maker of the note, and liable as such, while the note offered had a guaranty of payment indorsed thereon. Defendant claimed that this was a variance, and that the court should have excluded the guaranty under this third count, and confined the verdict to a recovery under the first two counts.

As we view the case, however, this objection has no force. The plaintiff being entitled to recover under the first and second counts of the declaration, the defendant was not prejudiced in the course taken by the court in not withdrawing all consideration of the case under the third count. The declaration was sufficient in the first two counts to allow a recovery thereunder.

The chief error complained of is the exclusion of the entire defense, and the direction of a verdict for plaintiff. On the trial the plaintiff proved by a witness the application for the loan, the loaning of the money, the giving of the note and guaranty, and, after reading the note and guaranty in evidence, rested. The defendant was then called and sworn as a witness in his own behalf, and was asked by his counsel:

"Q. When that note became due, in January, 1885,—January 15,—was any notice given you of the fact that it remained unpaid?"

To this question counsel for plaintiff objected, that the same was irrelevant and immaterial; that the defendant was not an indorser nor guarantor of collection, but of payment of the note.

Counsel for the defendant then offered to show by the witness that he had no notice of the non-payment of the note prior to June 8, 1887; that he was an accommodation guarantor without security; that, at or near the maturity of the note, he inquired of the maker, and was informed that it was paid; that, at the time, the maker of the note was solvent, and for some considerable time thereafter,—probably a year,—and that the defendant could, if he had any knowledge of its non-payment, have secured himself, or procured the maker to pay it; that, when the defendant learned of the non-payment of the note, the maker was insolvent, and out of the State, and no security could have been obtained by the defendant; the counsel then saying—

"That this, of course, is the line of defense marked out by the notice in the pleadings. It is all covered by my brother's argument; and, if we have no right to show that defense, then, of

course, there remains nothing but for the court to direct a verdict for the amount of the note, and interest."

The court sustained the objection, and directed a verdict for plaintiff.

In considering the case, the defendant's offer to prove this state of facts must be taken as true. (*Clay, etc.; Ins. Co. v. Manufacturing Co.*, 31 Mich. 356). Under this offer by the defendant, the issue is made: Is a person not being a party to a promissory note, who at its date and before delivery, and for the purpose of having a loan made upon the strength of his guaranty, guarantees the payment of such note, liable thereon in case the note is not paid at maturity, without notice of non-payment having been given to him by the holder at the maturity of the note, or within a reasonable time thereafter; or in case notice is not given, and no proceedings taken to collect the note from the maker, and the maker of the note, at the maturity thereof, was solvent, and subsequently, and before suit is brought on the guaranty, becomes insolvent, can such guarantor, when such action is brought against him, set up such insolvency as a defense? The defense being based on plaintiff's laches in not giving notice to defendant of the non-payment of this note at maturity, and the consequent damage to defendant thereby, the correctness of the court's ruling depends on whether or not there rested on the plaintiff the duty to give such notice under any circumstances.

The defendant claims that his liability existed only on the happening of a contingency and the performance of a condition; that whether or not that contingency happened, or condition was performed, was matter peculiarly within the knowledge of the plaintiff, and not within his own; and that if plaintiff intended to assert the performance of the condition, or the happening of the contingency, whereby alone defendant was to become liable, it was her duty to do so within a reasonable time, and, in any event, before the maker of the note became insolvent and a fugitive; that her neglect to do so, and the damage to him thereby, has released him from the obligation of his conditional contract.

The position, however, of a guarantor of payment, as between him and the maker of the note, is that of a surety. It is a common-law contract, and not a contract known to the law-merchant. It is an absolute promise to pay if the maker does not pay, and the right of action accrues against the guarantor at the moment the maker fails to pay. The guarantor would not be discharged by any neglect or even refusal on the part of the holder of the note to prosecute the principal, even if the maker was

solvent at the maturity of the note, and subsequently became insolvent; and the fact that no notice of non-payment was given the guarantor at the maturity of the note, or at any time before bringing suit, would not affect the rights of the holder of the note against the guarantor. The guarantor's remedy was to have paid the note, and taken it up, and himself proceeded against the maker.

A guaranty is held to be a contract by which one person is bound to another for due fulfillment of a promise or engagement of a third party. (2 Pars. Cont. 3).

The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. (3 Add. Cont., § 1111; 3 Kent, Comm. 121; *Wright v. Simpson*, 6 Ves. 734).

In the case of *Pain v. Packard*, 13 Johns. 174 (decided in 1816), it was held that if the surety call upon the creditor to collect the debt of the principal, and he disregard that request, and thereby the surety is injured, as by the subsequent insolvency of the principal, the surety was thereby discharged. A directly contrary decision was given by Chancellor Kent, upon argument and full consideration, the following year. (*King v. Baldwin*, 2 Johns. Ch. 554). Two years later the last decision was reversed by the court of errors by casting vote of the presiding officer, a layman, and against the opinion of the majority of the judges. (*King v. Baldwin*, 17 Johns. 384).

In the case of *Brown v. Curtiss*, 2 N. Y. 226 (decided in 1849), the action was brought against the guarantor of a promissory note. On the trial it was admitted that there had been no demand of the maker, nor any notice of non-payment, and the note was dated April 2, 1838, and payable six months after the date. The suit was brought against the guarantor in September, 1845. The defendant offered to prove that, from the time the note fell due until the latter part of 1843, the maker was able to pay the note; that he then failed, and was insolvent at the time of the commencement of the suit, and still remained so. This evidence was objected to, and excluded, and verdict directed for plaintiff. The court (at p. 227) says:

"The undertaking of the defendant was not conditional, like that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's

contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment; nor that he should sue the maker, or use any diligence to get the money from him. * * * Proof that when the note became due, and for several years afterwards, the maker was abundantly able to pay, and that he had since become insolvent, would be no answer to this action. The defendant was under an absolute agreement to see that the maker paid the note at maturity. * * * * *

"If the defendant wished to have him sued, he should have taken up the note, and brought the suit himself. The plaintiff was under no obligation to institute legal proceedings."

The weight of authority, both in this country and in England, sustains this doctrine, and we think with much good reason. (*Bellows v. Lovell*, 5 Pick. 310; *Davis v. Huggins*, 3 N. H. 231; *Page v. Webster*, 15 Me. 249; *Dennis v. Rider*, 2 McLean, 451).

In *Train v. Jones*, 11 Vt. 446, it is said:

"An absolute guaranty that the debt of a third person shall be paid, or that *he* shall pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated, and the creditor is not bound to use diligence, or to give reasonable notice of non-payment." (*Noyes v. Nichols*, 28 Vt. 174).

In *Bloom v. Warder*, 13 Neb. 478 (14 N. W. Rep. 396), which was an action against the guarantors of payment of a promissory note, the court says:

"This is an absolute contract, for a lawful consideration, that the money expressed in the note shall be paid at maturity thereof at all events, and depends in no degree upon a demand of payment of the maker of the note, or any diligence on the part of the holder."

Mere passiveness on the part of the holder will not release the guarantor, even if the maker of the note was solvent at its maturity, and thereafter became insolvent. (*Breed v. Hillhouse*, 7 Conn. 528; *Bank v. Hopson*, 53 Conn. 454 [5 Atl. Rep. 601]; *Foster v. Tolleson*, 13 Rich. Law, 33; *Machine Co. v. Jones*, 61 Mo. 409; *Barker v. Scudder*, 56 id. 276; *Norton v. Eastman*, 4 Greenl. 521; *Brown v. Curtiss*, 2 N. Y. 225; *Allen v. Rightmere*, 20 Johns. 365; *Bank v. Sinclair*, 60 N. H. 100; *Gage v. Bank*, 79 Ill. 62; *Hungerford v. O'Brien*, 37 Minn. 306 [34 N. W. Rep. 161]).

It follows that, this being an absolute undertaking on the part of the defendant as guarantor to pay the amount of this note at

maturity in the event of the default of payment by the principal, the guarantor could not demand any diligence on the part of the holder of the note to collect the same from the principal. It was his duty to perform his contract,—that is, to pay the note upon default of the principal; and it is no answer for him to say that the principal was solvent at the maturity of the note, and that the same could then have been collected of him by the holder, and that he has since become insolvent. If he wished to protect himself against loss, he should have kept his engagement with the holder of the note, paid it upon default of the principal, taken up the note, and himself prosecuted the party for whose faithful performance of the contract he became liable.

*The court properly directed the verdict for the plaintiff;
and the judgment of the court below must be affirmed,
with costs.*

The other justices concurred.

TITLE III.

RIGHTS OF THE HOLDER.

RIGHT TO SUE AND RECEIVE PAYMENT.

§ 53.

Hays v. Hathorn et al. (1878), 74 N. Y. 486.

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 10 Hun, 511).

This action was upon a promissory note, alleged in the complaint to have been made by the firm of Hathorn & Southgate, payable to the order of defendant, Frank H. Hathorn, and by him indorsed and transferred to plaintiff.

The facts appear sufficiently in the opinion.

Chas. S. Lester, for appellants.

John R. Putnam, for respondent.

HAND, J.—In their answer, the defendants denied that the note on which the action was brought was ever transferred to the plaintiff or that he was the legal owner or holder thereof. They further denied that the plaintiff was the real party in interest; alleged that the Saratoga County Bank was the real party in interest and the owner and holder and should be the plaintiff and that the note was duly transferred to it instead of to the plaintiff.

Upon the trial, the plaintiff having produced the note which was payable to the order of F. H. Hathorn and indorsed in blank by him, rested. The defendants then offered to prove that the note "was not the property of the plaintiff, that the same was never transferred to him, that he was not the real party in interest, that the note was the property of the Savings Bank who is the real party in interest." The evidence was objected to by the plaintiff as immaterial and was excluded. This ruling I think was erroneous and renders necessary a reversal of the judgment.

Under the answer and this offer, the defendants unquestion-

ably proposed to show substantially that the plaintiff had no title legal or equitable to the note and no right as owner to its possession. This might have been done by proving that he was the mere finder or the unlawful possessor, or that the right to its possession and ownership was in the bank to whom they were liable thereon, or in some other way. This they had a right to show.

It may be that, had their offer been admitted, they would have produced in fact no evidence to sustain it or prevent a recovery, but in considering the validity of their exception to the exclusion, we must assume that the evidence would have fully covered the propositions contained in the offer. And, as remarked in the dissenting opinion in the court below, "unless the defendants are to be precluded altogether from giving any evidence of a matter confessedly issuable, I do not see how this offer could be rejected."

The cases relied upon as justifying the exclusion of the evidence do not go that length. In *Cummings v. Morris* (25 N. Y., 625) it was held that the maker of a note could not defeat the plaintiff, not a payee, by proof that the consideration of the transfer to him was contingent upon his collecting the note. Such plaintiff was declared to be the real party in interest on the express ground that the transfer was complete and irrevocably vested in him the title to the note. In *City Bank v. Perkins* (29 N. Y., 554) there was no question of exclusion of evidence, but all the circumstances being proved, it was held that where the cashier of a bank holding commercial paper, pledged it "duly indorsed" to the plaintiff as security for a loan by the plaintiff to his bank, and it had been actually transmitted under his direction to the plaintiff so indorsed, it was no defense to one admitting his liability upon such paper to show lack of authority in the cashier alone to contract a loan for the bank; or the fraudulent diversion by him of the funds received from the plaintiff on such loan. Some remarks in the opinion in that case, not necessary to the decision, are perhaps too broad to be entirely approved, but it is fully conceded in it that proof that the plaintiff had no right whatever to the possession but was a mere finder or had obtained it by some "positive breach of law" would be a defense.

Brown v. Penfield (36 N. Y., 473) holds merely that proof by the party liable on a bill, of gross inadequacy of the consideration for the transfer of such bill to the plaintiff does not impeach the validity of such transfer as to the party so liable.

In *Allen v. Brown* (44 N. Y., 228) it was decided that, as against the plaintiff holding legal title to the claim by written assignment valid upon its face, the debtor cannot raise the ques-

tion as to the consideration for such assignment or the equities between the assignor and assignee.

In *Eaton v. Alger* (47 N. Y., 345) the note being payable to bearer and produced by the plaintiff upon the trial, it was proved that the payee had delivered it to the plaintiff upon his undertaking to collect it at his own expense and pay to such payee upon its collection a certain sum of money. This was held to show sufficiently that the plaintiff and not the payee was the real party in interest under the Code.

Sheridan v. The Mayor (68 N. Y., 30) reiterates the doctrine, that, as against the debtor, the plaintiff holding a written assignment of the claim to himself valid on its face, obtained the legal title and was the real party in interest notwithstanding the fact that the assignment was without consideration and merely colorable as between him and the original claimant. Such assignment is expressly declared to protect the debtor paying the assignee against a subsequent suit by the assignor.

In *Gage v. Kendall* (15 Wend., 640) the fact that the prosecution of the note was by *its owner and holder* in the name of the plaintiff a stranger to it, without his consent or knowledge, was sought to be set up as a defense, but it was ruled out on the ground that the nominal plaintiff need have no title to or interest in the paper sued upon. We apprehend the Code has changed this and that such facts would now be fatal to an action. Such a plaintiff could not in any view be the real party in interest. Indeed he would not even have manual possession of the paper.

From this glance at the cases, it appears that it is ordinarily no defense to the party sued upon commercial paper, to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority. It is sufficient to make the plaintiff the real party in interest, if he have the legal title either by written transfer or delivery, whatever may be the equities between him and his assignor. But to be entitled to sue, he must now have the right of possession and ordinarily be the legal owner. Such ownership may be as equitable trustee, it may have been acquired without adequate consideration, but must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor.

As we understand the scope of the offer in the present case, it went to entirely disprove any ownership or interest whatever or even right to possession as owner in the plaintiff. It should there-

ingly without seeing upon its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank, before purchasing it, to have made enquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and as it turns out, he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed.

In the case of *Shaw v. Spencer, and others*, 100 Mass., 382, the question is considered, whether the addition of the word *trustee* to the name alone is sufficient to indicate a trust and put a party upon inquiry. That was the case of stock certificates, which were pledged by the holder as collaterals for certain acceptances. The certificates in question were in the name of E. Carter, *trustee*. They were by him endorsed, and one of the questions presented was whether the word *trustee* was sufficient to put the holders upon inquiry, and thereby affect them with notice of the trust. The Court says on page 393, "The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question, whether the word 'trustee' alone has any significance and does amount to notice of the existence of a trust. But this has heretofore been decided, and is no longer an open question in this commonwealth." And upon the ground that pledgees took the certificates with this notice of the trust, it was held that they could not retain them against the equitable owner, inasmuch as Carter, the trustee, had no authority to use or dispose of them for any such purpose.

The argument, that the bank should not be deprived of its action against J. Regester & Sons, whose endorsement it is claimed guarantees the preceding endorser, would be entitled to weight but for the facts of the case. While the rule is undoubted that a subsequent endorser guarantees the preceding endorsement, it cannot apply to a case where in fact there was no previous endorsement at the time of the alleged second endorsement. The obligations of J. Regester & Sons upon this note were those of original makers, *Ives v. Bosley*, 35 Md., 263; *Good v. Martin*, (Sup. Court U. S.) Am. L. Reg., Feb'y, 1878, as is clearly shown by the proof in the case. Their name was placed upon the note as security, and they cannot be held to a contract of guaranty

into which they never entered. That parol evidence is admissible to show the character in which they stand relative to this note is settled by the Supreme Court of the United States in the case of *Good v. Martin*, just referred to.

We are therefore very clearly of opinion, that the bank cannot hold Regester & Sons liable as guarantors. When the note is paid, their liability ceases.

We find no error in the decree of the court below, and it will be affirmed.

Decree affirmed with costs, and case remanded.

Fisher v. Leland et al. (1849), 4 Cush. 456.

This was an action of assumpsit on a negotiable promissory note, made by the defendant Leland, as principal, and the other defendants, Fogg and Harrington, as sureties, to one James Luke, Jr., or order, and by him, before maturity, indorsed to the plaintiff.

The defendant pleaded the general issue, and filed a specification of defence, in which they set forth that they should undertake to prove that the note relied on by the plaintiff was obtained by Luke, the payee, by fraud and fraudulent misrepresentation, and without consideration; of all which the plaintiff had notice when he took the note. The defendants further alleged, in their specifications, that Leland and Luke, who were formerly partners, dissolved their partnership in March, 1847, Luke assigning to Leland his interest in the concern, and Leland giving Luke the note in question, with others, and a bond to pay the liabilities of the firm; that Luke kept the books of the partnership, and, at the time of the dissolution, knowing that Leland relied on his statements, represented to him that the assets of the concern were greater and the liabilities much less than they were in fact, that he also withheld from Leland knowledge of the fact that he, Luke, had appropriated to himself certain funds of the concern and the proceeds of certain debts due the same; that he thus induced Leland to give the notes, of which the note in question was one, and the bond above mentioned; and that herein consisted the fraud, misrepresentation, and want of consideration, of which the plaintiff had notice.

At the trial, before Byington, J., in the court of common pleas, the defendants offered evidence that the plaintiff took the

note with notice that it was obtained by fraud, and would not be paid by any party to it. There was no evidence of the death of Luke, but the defendants then offered to prove by his admissions made while the note was held by him, and before its indorsement to the plaintiff, that he made such representations. To this evidence the plaintiff objected, but the judge admitted it.

In order to show knowledge on the part of Luke of the falsity of these representations, and for other reasons, the defendants offered to prove specific acts of fraud committed by Luke, against Leland, such as misappropriating the assets of the firm, altering the books of account, &c., before and at the time of the making of the note, and as inducements thereto. To this evidence the plaintiff objected, but the court admitted it.

The jury returned a verdict for the defendants, and the plaintiff thereupon alleged exceptions to the above rulings.

B. F. Jacobs, for the plaintiff.

G. M. Brown, for the defendants.

SHAW, C. J. The single question is, whether, after the defendant had proved that the plaintiff took the note in question by indorsement before it was due, but with notice that the promisors intended to defend on the ground, that the note was obtained by the payee of the maker by fraud, they could give in evidence the fraudulent acts of the payee; and whether they could give in evidence the admissions and confessions of the payee, whilst he was the holder of the note and before the indorsement, to prove such fraud. The distinction appears to be this: that when an indorsee takes a bill or note, by indorsement, before it is due, and without notice of fraud or other matters of defence, he takes it on an independent title by the indorsement, and will not be affected by any payment, set-off, fraudulent consideration, or other matter of defence, which the acceptor or promisor might have had against any previous holder or prior party. He is not in privity with such prior party, does not claim under him, and is not bound by the acts, frauds, or admissions of any such prior party. And in order to give the highest credit and the freest circulation to negotiable securities, transferred by indorsement, in favor of commerce, this principle is held with great firmness and strictness; and by a series of recent decisions, the rule upon the subject, instead of being relaxed, is held with greater strictness than formerly. (*O'Keefe v. Dunn*, 6 Taunt. 305; *Dunn v. O'Keefe*, 5 M. & S. 282; *Gill v. Cubitt*, 3 B. & C. 466; *Goodman v. Harvey*, 4 Ad. & El. 870; *Fos-*

ter v. Pearson, 1 C. M. & R. 849; *Arbouin v. Anderson*, 1 Ad. & El. N. S. 498).

But where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, Why is it in circulation,—why is it not paid? here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defence, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any defence which would be made, if the suit were brought by the indorser. The note does not cease to be negotiable; the indorsee takes a title, and may sue, but he is so far in privity with his indorser that he takes only his title; and if the defendant could make any defence against a suit brought by such indorser, he can make it against the indorsee.

This rule is settled in the case of a suit by an indorsee taking the note overdue, by a series of authorities, which show not only that such defence may be made, but that it may be proved by the same evidence, by which it might have been proved if the indorser were plaintiff, to wit, the admissions of such indorser, made whilst he was the holder. (*Sylvester v. Crapo*, 15 Pick. 92; *Barrough v. White*, 4 B. & C. 325; *Phillips v. Cole*, 10 Ad. & El. 106; *Beauchamp v. Parry*, 1 B. & Ad. 89). These authorities might be multiplied almost indefinitely.

But the indorsement of a note overdue is only one mode of giving the indorser notice, that there is some matter of defence relied on; if he has express notice, he may take it and may sue the note, but he takes subject to such defence as the defendant might make against the indorser.

The case in an early volume of the reports of this court, *Wilson v. Holmes*, 5 Mass. 543, was one where the plaintiff had notice in the form of the indorsement, which was: "Pay T. W., or order, for our use, value received in account." See *Humphries v. Blight*, 4 Dall. 370; *White v. Nubling*, 11 Johns. 128. In the early leading case on this subject, *Brown v. Davies*, 3 T. R. 80, 83, Lord Kenyon, who was not disposed to go quite the length of the doctrine held by Mr. Justice Buller, says: "I agree, &c., if it appears on the face of the note to have been dishonored, or if knowledge can be brought home to the indorsee that it had been so." In a note to the same case, in *Taylor v. Mather*, where the defence was, that the note was obtained by fraud, and where it was negotiated when overdue, Buller, J., says: "Such a note is negotiable, but if there are any circumstances of fraud in the

transaction, I have always left it to the jury, on the slightest evidence, to presume that the indorsee was acquainted with the fraud."

It seems, therefore, that it is not that the indorsement of a note after it is due is, *per se*, such as to render the note void, or to defeat the right of the plaintiff; but if there are anterior circumstances, such as fraud in obtaining the note, the fact that the indorsee takes it when overdue, is a circumstance of suspicion, which should put him on inquiry, and leads to a presumption that he knew, or by inquiry might know, of such fraud, and is deemed constructive notice of it. It identifies the title of the indorsee with that of the indorser. This being so, actual notice of such fraud, brought home to the knowledge of the indorsee at the time he took the note by indorsement, is equally availing to prove that he is not a *bona fide* holder, and to give the defendant the same ground of defence as he would have had against the indorser.

Exceptions overruled.

Kelley v. Whitney et al. (1878), 45 Wis. 110.

Appeal from the Circuit Court for Brown county.

The case is thus stated by Mr. JUSTICE COLE:

This was an action to foreclose a mortgage originally given upon lot number 30, and the south 34 feet of lot number 29, in Fort Howard. The mortgage was executed by Bridget Whitney and Edwin Whitney to Joel S. Fisk on the 25th of February, 1873, to secure the payment of a promissory note of that date given by the mortgagors to Fisk or order, for \$233.03 in six years from date, with interest payable annually thereon at the rate of ten per cent per annum. J. S. Curtis, for a valuable consideration, purchased the note and mortgage of Fisk on the 11th of July, 1874. The plaintiff derives title from Curtis by an assignment bearing date May 20, 1876. When the note and mortgage came to plaintiff's hands, the principal was not due, but there was interest overdue and unpaid. The defendants Bridget and Edwin Whitney answered, alleging, among other things, payment in full to plaintiff's assignor on or about the 25th of June, 1874, under and in pursuance of an agreement set out in the answer. The defendant Goodenough answered separately, alleging payment of the mortgage previous to the assignment to the plaintiff, and further that he was the owner of a mortgage given by Bridget and Edwin Whitney, June 26, 1874, on a portion of the mort-

gaged premises, to wit, the north ten feet of lot number 30, and the south 34 feet of lot 29, being a portion of the mortgaged premises remaining and covered by plaintiff's mortgage, after Curtis had released the south 45 feet of lot 30 therefrom while he held the mortgage. The agreement set out in the answers, under which it was claimed that the note and mortgage were paid, was never recorded; the plaintiff had no knowledge of its existence when he purchased the securities; nor had he any actual notice of any other fact affecting their validity, except the fact that interest was overdue and unpaid when they were transferred. The circuit court found that the note and mortgage were paid and extinguished while in the hands of Curtis, and rendered judgment for the defendants.

Plaintiff appealed from the judgment.

Tracy & Bailey, for appellant.

L. J. Billings, for respondent.

COLE, J.—Can the plaintiff, under the circumstances, claim the protection which the law affords a *bona fide* purchaser of commercial paper for value, before maturity? The learned circuit court, in obedience to the decision of this court in *Hart v. Stickney*, 41 Wis. 630, decided that the plaintiff took the note and mortgage as dishonored and subject to equity, because installments of interest were due and unpaid when they were transferred. If there is error in this ruling of the court below—as we are well satisfied there is,—it is an error for which this court, and not the circuit court, should be held responsible. When the case of *Hart v. Stickney* was decided, our attention was not called by counsel, and we entirely overlooked in our examination, the previous case of *Boss v. Hewitt*, in the 15 Wis., 260, where a directly opposite ruling was made. The case of *Boss v. Hewitt* was decided in 1862, and the point was directly involved in the judgment. The defendant had given four negotiable notes payable respectively in one, two, three and four years, with interest payable annually, for the price of sheep bought of the payees, and secured all the notes by a mortgage. One of the notes, and an installment of interest on all of them, being due and unpaid, the payees transferred the notes and mortgage to the plaintiff, who brought an action to foreclose the mortgage. The defendant pleaded fraud on the part of the payees in the sale of the sheep. The court held that the fact that the first note was due and unpaid at the time of the transfer to the plaintiff, did not let in the defense as against the notes not then due. On the other point, Mr. Jus-

tice Paine, in delivering the opinion of the court, says: "Neither do we think that the fact that the interest had not been paid makes the case equivalent to a purchase after maturity, so as to let in defenses that might have been made against the original parties. The interest is a mere incident to the debt, and although it is frequently provided that it shall be paid at stated periods before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note, so as to let in all defenses against subsequent purchasers for value without any other notice of defects except the mere fact that such interest has not been paid. And we do not think it should have that effect. The maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due." pp. 262-3. *Boss v. Hewitt* derives direct support from the decisions in *National Bank of North America v. Kirby*, 108 Mass. 497, and *Cromwell v. County of Sac*, 96 U. S. 51. It is true, in *National Bank v. Kirby*, while it was held that failure to pay interest, standing alone, was not sufficient in law to throw such discredit upon the principal security upon which it was due, as to subject the holder, to the full extent of the security, to antecedent equities, yet it was also held that it was a fact proper to be considered by the jury, in connection with other circumstances, on the question whether the holder is entitled to the protection of one who has taken it in good faith and without actual or constructive notice of existing defenses. What is said in the opinion in *Hart v. Stickney* upon the point now in question, was not necessarily involved in the decision, and must therefore be regarded as a mere dictum. The judgment in that case was reversed on the appeal of the plaintiff, the holder of the note, on the ground that the trial court refused proper, and gave erroneous, instructions as to the legal consequences resulting where a vendee abandons possession of premises held by him under an executory contract of sale, and the vendor takes the possession. That was the precise point upon which the judgment was reversed. And as the earlier case of *Boss v. Hewitt* was entirely overlooked, which, by implication, is sustained by many decisions of this court, made in the farm mortgage cases and in actions arising upon town, county and city bonds, we deem it our duty to adhere to the rule, that a purchaser for value of unmaturing commercial paper, with interest overdue, is not, from that fact alone, affected with notice of prior equities or infirmities in the title.

The plaintiff being the purchaser of the note and mortgage

for value before maturity, the further question arises, whether there were any circumstances or facts disclosed which can affect his rights as a *bona fide* holder. In considering this question, it is necessary to bear in mind that it is the settled law in this state that a negotiable promissory note secured by mortgage may be transferred before maturity like other negotiable paper, and the holder takes it discharged of existing equities. The mortgage in such a case passes as an incident to the note, and may be enforced by the holder in spite of equities which may exist between the mortgagor and mortgagee. This is the doctrine laid down in *Croft v. Bunster*, 9 Wis. 504, and the same point has been repeatedly affirmed in subsequent cases. And, "as with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part." *Cromwell v. County of Sac*, *supra*. Was the plaintiff guilty of gross negligence, or had he any ground of suspicion of defect of title, or knowledge of circumstances which would excite suspicion on the part of a prudent man that there was some infirmity in these securities; and if so, what were those circumstances? The note, it is said, was indorsed by the payee and mortgagee "*without recourse*." But that "is not sufficient to charge the assignee with notice of a defense against the note, on the part of the maker, nor is it sufficient to put him on inquiry in reference thereto." *Stevenson v. O'Neal*, 71 Ill. 314. Then it is said that the words "secured by real estate mortgage" appeared on the face of the note. But "the object and intent of the parties in putting these words on the note was not to limit or impair its value, but to add to it; * * * and they were neither sufficient to inform third parties of the contents or terms of the mortgage, nor to put them upon inquiry." *Howry v. Eppinger*, 34 Mich. 29-33. Again, it is claimed that there was on the records in the register's office a satisfaction or release of the note and mortgage in suit, executed by Curtis on the 16th day of July, 1874, so far as the mortgage was a lien on the south 45 feet of lot 30, known as the hotel property. But the plaintiff does not claim anything inconsistent with that release, even if chargeable with actual knowledge of its existence.

But it is also said that while Curtis was the owner of plaintiff's note and mortgage, and when he executed this release, he knew of the existence of the second mortgage now held by the

defendant Goodenough on a portion of the premises covered by the first. Suppose he did: it does not appear that when plaintiff bought the note and mortgage, he had knowledge of either the release or the second mortgage. The doctrine is well settled, "that equity will not permit a prior mortgagee, knowing that portions of the mortgaged premises have been subsequently conveyed or incumbered by the mortgagor, to deal with him arbitrarily, to the prejudice of the interests of such subsequent incumbrancers or purchasers, by releasing those parts of the land on which he has the only lien, and attempting to enforce his entire claim out of those portions in which such others had become interested." *Deuster v. McCamus*, 14 Wis. 308-311. But we do not see that this equitable principle has any application to this case, because the defendant Goodenough does not aver in his answer that he was injured in any way by the discharge of the prior mortgage as to a part of the premises contained in that mortgage; and the proof shows beyond a doubt that he was not prejudiced thereby. The property may be ample security, and it appears that it is, to discharge both mortgages. So, in any aspect of the case, we think the plaintiff is entitled to a judgment of foreclosure according to the prayer of his complaint.

By the Court.—*The judgment of the circuit court is reversed, and the cause remanded with directions to enter such a judgment.*

RYAN, C. J., took no part.

WHAT CONSTITUTES NOTICE OF DEFECT.

§ 58.

Hamilton v. Vought (1870), 34 N. J. L. 187.

Case certified from the Sussex Circuit Court.

Hamilton and *McCarter*, for plaintiff.

Coult and *Pitney*, for defendant.

BEASLEY, Chief Justice.—We have presented to our consideration in this case but a single question, viz., whether the title of a holder of negotiable paper, acquired before it was due, for valuable consideration, is affected by the fraud of a prior party, without proof of bad faith on the part of such holder.

At the trial of this cause, the jury was instructed that if the holder of the note sued on—the plaintiff in the action—acquired his title under circumstances which should have put a person of

ordinary prudence upon his guard, the note was invalid, if its inception had been fraudulent.

The verdict was in favor of the defence, and the plaintiff now insists that the judicial instruction should have been, that suspicious circumstances attending the acquisition of his title were not sufficient to defeat his claim, unless of a character to raise a conviction of actual fraud on his part.

Counsel who so ably argued this case in behalf of the defendant, did not deny that the modern English authorities were hostile to their position, but they went upon the ground that the rule thus sanctioned was an innovation, and consequently would not be followed by this court. The ancient rule, it was maintained, is that declared in *Gill v. Cubitt*, 3 Barn. & Cress. 466. This decision was made in the year 1824, and, beyond all question, it sustains the principle now claimed by the defence, for, in the reported case referred to, the jury were explicitly told that "there were two questions for their consideration: first, whether the plaintiff had given value for the bill, of which there could be no doubt; and, secondly, whether he took it under circumstances which ought to have excited the suspicions of a prudent and careful man." The authority is directly in point, and the only question which can arise is, whether it correctly states the ancient rule of the common law upon the subject.

My first remark in this connection is, that from the opinion of the judges in the case of *Gill v. Cubitt*, it appears that the doctrine adopted was intended to be an innovation upon the antecedent practice, and that it was avowedly opposed to a decision of the greatest weight. Twenty-three years before, in the year 1801, Lord Kenyon, in *Lawson v. Weston*, 4 Esp. 56, had expressly repudiated the idea that suspicious circumstances, in the absence of actual fraud, would avoid a note in the hands of a holder for value. But this doctrine did not harmonize with the views of the judge in the case of *Gill v. Cubitt*, and it was accordingly overruled. Thus, Chief Justice Abbott says, in his opinion: "I think the sooner it is known that the case of *Lawson v. Weston* is doubted, at least by this court, the better. I wish doubts had been cast on that case at an earlier time." And he concludes: "For these reasons, notwithstanding all the unfeigned reverence I feel for everything that fell from Lord Kenyon, by whom *Lawson v. Weston* was decided, I cannot think that the view taken by that learned lord was a correct one." Nor is this rejection of this antecedent decision attempted, in the slightest degree, to be put upon the foundation of pre-existing authority; not a case is

referred to for its justification, and although in *Lawson v. Weston*, the authority of Lord Mansfield, in *Miller v. Race*, was mooted, no remark is made on that circumstance. I think a perusal of the opinions in *Gill v. Cubitt* will satisfy any one that it was a well-understood intention to deviate from the legal rule upon this subject which had previously existed; or, if any doubt should remain, such doubt will certainly be dispelled by a reference to the case of *Slater v. West*, 3 Carr. & Payne 325, decided in the year 1828, in which Chief Justice Abbott, (then Lord Tenterden) in laying down the doctrine that a person is not entitled to recover who takes a bill of exchange "under circumstances which ought to excite suspicion in the mind of a reasonable man," says: "This doctrine is of modern origin. I believe I was the first judge who decided this point at *nisi prius*. The court to which I belong confirmed my decision, and the other courts have, I believe, acted on the same principle." And Chief Justice Bayley, in his opinion in *Gill v. Cubitt*, is equally explicit. "But, it is said"—such is his language—"that the question usually submitted for the consideration of the jury in cases of this description, up to the period of time at which my Lord Chief Justice's direction was given, has been whether the bill was taken *bona fide*, and whether a valuable consideration was given for it. I admit that has been generally the case." From these citations, I think it is manifest that the judges who participated in the decision of the case of *Gill v. Cubitt* were aware that by the views expressed by them, they introduced a novelty, and departed from the older practice of the courts. That the principle adopted in that case was an innovation, seems to me unquestionable. I have shown that it is irreconcilable with *Lawson v. Weston*. So it plainly occupies the same relation to the case of *Peacock v. Rhodes*, Doug. 632, decided by Lord Mansfield in 1781. This rule which it endeavors to overthrow will be found sustained in *Miller v. Race*, 1 Burr. 452; *Price v. Neal*, 3 Burr. 1355; *Grant v. Vaughan*, 3 Burr. 1516; *Anonymous*, 1 Lord Raymond 738; *Morris v. Lee*, 2 Lord Raymond 1396. There was not a case cited upon the argument, nor have my researches led me to one anterior to the decision of *Gill v. Cubitt*, which sustains the doctrine there propounded. I confidently conclude, therefore, that the case above criticised cannot stand on the ground of ancient authority. In my apprehension, the original rule as it existed in the time of Lords Kenyon and Mansfield was, that nothing short of *mala fides* would vitiate the title of the holder of negotiable paper taking it for value, before maturity. It is entirely out of the question, therefore, for this

court to regard *Gill v. Cubitt* as imperative authority. It is true that that case was followed for a time to a considerable extent by the English courts. But, as I have already said, in England the original rule has been re-instated. In *Backhouse v. Harrison*, 5 B. & Ad. 1098, Mr. Justice Patterson says: "I have no hesitation in saying that the doctrine *first laid down* in *Gill v. Cubitt*, and acted upon in other cases, has gone too far and ought to be restricted." And in *Goodman v. Harvey*, 4 Ad. & El. 870, Lord Denman thus forcibly expresses the rule at present prevailing in the courts at Westminster: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." The following cases recognize and enforce the same rule: *Uther v. Rich*, 10 Ad. & El. 784; *Artbouin v. Anderson*, 1 Ad. & El. (N. S.) 498; *Stephens v. Foster*, 1 Crompt., Mees. & Ros. 894; *Palmer v. Richards*, 1 Eng. L. & Eq. 529; *Marston v. Allen*, 8 Mees. & Wels. 494; *Raphael v. Bank of England*, 17 C. B. 161.

An examination of the American reports will disclose a similar mutation of judicial opinion upon this subject. For a time, in several of the states, the rule broached in the case of *Gill v. Cubitt* has been acted upon; but now, in most of them, and in those of the most commercial importance, that rule has been entirely discarded. (34 New York, 247; *Magee v. Badger*; 7 Bosworth 543, *Bel. Bank of Ohio v. Hoge et al.*; 10 Cush. 488, *Worcester, &c., Bank v. Dorchester, &c., Bank*; 4 Geo. 287, *Matthews v. Poythress*; 6 Md. 509, *Elli v. Martin*, 36 New Hamp. 273, *Crosby v. Grant*).

The subject has also recently been settled, after an elaborate discussion and full consideration in the Supreme Court of the United States, in the case of *Goodman v. Simonds*, 20 How. 343, the result being an explicit repudiation of the doctrine that suspicious circumstances will, *per se*, vitiate the title to commercial paper.

From this brief review of the cases, I think it may be safely said that the doctrine introduced by Lord Tenterden stands at the present moment marked with the disapproval of the highest judicial authority. Nor does such disapproval rest upon merely

speculative grounds. That doctrine was put in practice for a course of years, and it was thus, from experience, found to be inconsistent with true commercial policy. Its defect—a great defect, as I think—was, that it provided nothing like a criterion on which a verdict was to be based. The rule was, that to defeat the note, circumstances must be shown of so suspicious a character that they would put a man of ordinary prudence on inquiry—and by force of such a rule it is obvious every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of a jury. An incident of the transaction from which any suspicion could arise was sufficient to take the case out of the control of the court. There was no judicial standard by which suspicious circumstances could be measured before committing them to the jury. And it is precisely this want which the modern rule supplies. When *mala fides* is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear, the court can arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith can be reasonably inferred. Thus the subject has passed from the indefinite to comparatively definite; from the intangible to the comparatively tangible. From a mere matter of fact, the question, to some extent, has become one of law. I cannot doubt, when we recollect that inquiries of this nature always attend that class of cases where judgments are sought against innocent and unfortunate parties, that the change is most beneficial. All experience has shown how hard it is to prevent juries from seizing on the slightest circumstances to avoid giving a verdict against the maker of a note which had been obtained by fraud or theft. To preserve the negotiability of commercial paper and guard the interests of trade, it is absolutely necessary that large power should be placed in the judicial hand when the question arises as to what facts are sufficient to defeat the claim of the holder of a note or bill which has been taken before maturity, and for which value has been paid. It is only in this mode that the requisite stability in transactions of this kind can be retained. But I do not think the difference between the two rules above discussed is as great as some persons have supposed. In my apprehension, the entire variance consists in the degree of proof which the court will require in order to submit the inquiry to the jury. Mere carelessness in taking the paper will not, of itself, impair the title so acquired; but carelessness may be so gross that bad faith may

be inferred from it. Nor is it necessary, in order to defeat the title of the holder, that he have actual knowledge of the facts and circumstances constituting the particular fraud; it is sufficient if he have knowledge that the paper is tainted with any fraud, although he may be ignorant of the nature of it. In the case of *May v. Chapman*, 16 Mees. & W. 355, Baron Parke says: "I agree that 'notice and knowledge' means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes." Reviewed in this sense, as I have already remarked, the principle seems to me a highly salutary one, and, in the language of Professor Parsons, is well "adapted to the free circulation of negotiable paper and the true interests of trade." (1 Par. B. & N. 259).

I think a new trial should be granted.

SCUDDER and VAN SYCKEL, Justices, concurred.

Cheever v. The Pittsburg &c. R. R. Co. (1896), 150 N. Y. 59.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 13, 1893, which overruled plaintiff's exceptions taken on the trial at Circuit and ordered to be heard in the first instance at General Term, and directed judgment for the defendant dismissing the plaintiff's complaint as to the first and second causes of action therein contained.

The nature of the action and the facts, so far as material, are stated in the opinions.

Austen G. Fox, for appellant.

Frank Sullivan Smith, for respondent.

O'BRIEN, J.—The complaint in this action contained four separate causes of action, each upon a promissory note of the defendant. The last two causes of action were not defended, and upon these the plaintiff recovered, but was defeated upon the two notes embraced in the first and second causes of action. The defense to these two notes was that they were made by the defendant's president, one M. S. Frost, and by him wrongfully diverted from the uses and purposes for which they were intended to his own personal or private benefit, or the benefit of a firm of which he was a member, and that the plaintiff is not a *bona fide* holder, but chargeable with notice of these facts.

The following are copies of the two notes in controversy, with the indorsements thereon when put in circulation by the defendant's president:

"\$5,000.

GREENVILLE, PA., Feb'y 24th, 1888.

"Four months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York city.

"Value received.

THE PITTSBURGH, SHENANGO & LAKE

"Attest,

ERIE RAILROAD COMPANY.

"E. S. TEMPLETON,

By M. S. FROST,

"Secretary.

"President."

Indorsed:

"Pay to the order of M. S. FROST & SON,

"JOHN T. BRUEN,

"M. S. FROST & SON."

"\$5,000.00

GREENVILLE, PA., Feb'y 24th, 1888.

"Three months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York city.

"Value received.

THE PITTSBURGH, SHENANGO & LAKE

"Attest,

ERIE RAILROAD COMPANY.

"E. S. TEMPLETON,

By M. S. FROST,

"Secretary.

"President."

Indorsed—"JOHN T. BRUEN,

"M. S. FROST & SON."

The body of these notes and every part of them except the signature of the president was in the handwriting of Templeton, the secretary. The president was authorized by the board of directors to issue the corporate notes to the extent of \$10,000 for the purpose of purchasing flat cars. In March, 1888, before the notes became due, Frost went to Boston and there negotiated a cash loan of \$30,000 from Francis A. Brooks for the benefit of M. S. Frost & Son, giving the firm note therefor and delivering to him the two notes in question, indorsed as they now appear, with other obligations, as collateral security for the payment of this loan. Subsequent to the maturity of the notes Brooks became the absolute owner by consent of the pledgor and the proceeds applied upon the debt, and still later he transferred them to a third party, and they have come to the hands of the plaintiff for value. It is not claimed that the plaintiff occupies any other or different

position than Brooks would if he had brought the action upon the notes at maturity. Bruen, the payee of the notes, was the private secretary of Frost, the president, and the notes were made payable to him by Templeton, the secretary of defendant, who drew them in that form at the suggestion of the president. There is not and cannot be any dispute with respect to the authority of Frost to make the notes. They were made with sufficient authority, the fraud upon the defendant consisting in the wrongful use of them when made for a legitimate purpose by the president for his own private business.

Nor is there any dispute with respect to the fact appearing on the plaintiff's case, that Brooks paid value for the notes and made present advances in cash to Frost in the sum already stated. It is equally clear upon the record that Brooks had no actual knowledge of the facts surrounding the origin of the paper or of the diversion of it by the president. He received the notes and made the advance in Boston, whereas they were made and the transaction stated with respect to them took place in a distant State, where the office of the company was, and is indicated on the paper as the place where made.

The learned trial judge held as matter of law that the plaintiff could not recover upon the notes for the reason that he was chargeable with knowledge of the facts and circumstances that rendered them invalid in the hands of Frost. The plaintiff is, doubtless, chargeable with such knowledge or notice as to the antecedent equities of the defendant as Brooks, his assignor, had, but with no others. If the notes were valid obligations in the hands of Brooks the plaintiff may assert every right that he could have asserted. It needs no argument to show that if Brooks had knowledge or notice or is in law chargeable with knowledge or notice of the fraud by means of which the notes were diverted from the purpose for which they were authorized to be made, that the plaintiff cannot recover. But it is not claimed that he knew anything about the origin or diversion of the paper in fact. All that is claimed is that when it was presented to him in Boston by Frost, whom he knew to be the president of the railroad, there was enough upon the face of the paper to put him upon inquiry and, therefore, to charge him with knowledge of all the facts that such inquiry would have disclosed. He knew nothing, so far as appears, outside of the paper itself, except the fact that the party presenting it was defendants' president and that he was proposing to pledge notes for his own debt, or rather for the debt of his firm, which for all the purposes of the question may be assumed

to be the same thing. The question in the case is, therefore, reduced to a very narrow inquiry, and that is whether Brooks, standing in all other respects in the position and sustaining the character of a *bona fide* purchaser of negotiable paper, is deprived of that character and the benefits of that position by reason of anything appearing upon the face of the notes themselves.

The mind, at the threshold of the inquiry, encounters two principles that point in opposite directions and lead to different conclusions, as the one or the other is allowed to preponderate in the mental process of determining the legal rights of the parties. On the one hand is the principle which protects a *bona fide* holder of commercial paper from existing antecedent equities between the parties, and on the other the principle which protects a corporation from the unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented for discount or sale before due. He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitting precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail. (*Magee v. Badger*, 34 N. Y. 249; *Am. Ex. Nat. Bk. v. N. Y. Belting, etc., Co.*, 148 N. Y. 705; *Knox v. Eden Musee Am. Co.*, 148 N. Y. 454; *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y. 202; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652).

Applying these rules to the conceded facts of the case, it seems to me to be impossible to impute bad faith to Brooks in the transaction. He advanced a large sum of money on the faith of the paper, without any actual knowledge that the relations of the party with whom he dealt to the paper were different from what they appeared to be on the face of it. The question now is, not what the facts were, but what they appeared to be, and what he had the right, from the notes themselves, to assume. He had the right to assume that the relations to the paper of every party

whose name appeared on it were precisely what they appeared to be. (*Hoge v. Lansing*, 35 N. Y. 136). He had the right to believe that the notes had been issued by the defendant to Bruen for value in the regular course of business, and were by him transferred to Frost & Son in like manner. There was nothing to suggest to him that Frost was dealing with paper that belonged to the railroad for his own benefit. The appearances were that the defendant had put the notes in circulation by delivery to Bruen, and that they came to Frost's firm in the regular course of business for value and were then the property of the firm. It is quite true that all these appearances were deceptive and that the actual facts were otherwise. But how was a banker or business man in Boston to know or suspect that Bruen was only the nominal payee and a mere instrument in the transaction to enable the president to divert the paper to his own use. The name of the party who presented it and had it in his possession appeared on the face of the paper to have signed it as president. The name of another officer of the corporation was upon it also, attesting its regularity, and everything was in his handwriting except the signature of the president and the indorsement of the payee. So far as Brooks was concerned, the paper showed that it had been issued to a stranger in the regular course of business, and, through his indorsement, had come to the hands of a mercantile firm of which the president of the corporation was a member. If this were the fact, there is no doubt as to his right to use it in the business of the firm. The holder of a note who has no actual knowledge or notice of a defect in the title, or other equities between the parties, when circumstances come to his knowledge sufficient to put him upon inquiry, is chargeable with knowledge of all the facts that such inquiry would have revealed. The difficulty in this case is to find the circumstance which can be said to be sufficient to put Brooks upon the inquiry. There was absolutely nothing on the face of the paper except the signature, as president, of the party who was dealing with it, and that, we think, was not sufficient in view of the fact that the appearances were that he was a purchaser from a third party.

The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it. (*Hanover Bank v. Am. Dock & T. Co.*, 148 N. Y. 612; *Bank of N. Y., etc., v. Am. Dock & T. Co.*, 143 N. Y.

559; *Wilson v. M. E. R. Co.*, 120 N. Y. 145; *Grona v. McCormick*, 130 N. Y. 261). There are numerous cases that belong to that class cited by the learned counsel for the defendant on his brief. There is a manifest distinction between them and the case at bar. Here the officer was not dealing with the corporate notes payable to himself but with notes that had been regularly issued, so far as appeared from their face, to a stranger, and by him transferred to a firm of which the officer was a member and for which he acted as agent in procuring the loan from Brooks and pledging them as security. The presence of Frost's name upon the paper, as one of the agents who issued it, was not naturally or reasonably calculated, under the circumstances, to arouse suspicion in the mind of Brooks, or to lead him to believe that the president was attempting to defraud the corporation in disposing of the notes. None of the cases cited by the learned counsel for the defendant sustain the proposition that such a circumstance is sufficient to put the purchaser of negotiable paper upon inquiry or charge him with knowledge of the fact in case he fails to make it, and there are many cases that tend to support the contrary view. (*Am. Ex. Nat. Bank v. N. Y. B. & P. Co.*, 148 N. Y. 698; *Müller v. Consolidation Bank*, 48 Penn. St. 514; *Walker v. Kee*, 14 S. C. 142).

It is said that if the plaintiff's right to recover in this case is sanctioned by this court an easy way will be opened for the perpetration of frauds upon corporations by officers intrusted with its negotiable obligations, and that the device of making the paper payable to the order of a nominal payee, interested or aiding in the fraud, will be a favorite one to accomplish the end. We must leave all such cases to be dealt with upon the peculiar facts and circumstances as they arise. It is more reasonable and just to assume that corporations will be able to protect themselves by proper vigilance from the dishonesty of their own officers, than to impute to parties who have taken the paper for value, ignorant of its origin, constructive knowledge of the facts upon such circumstances as exist in this case.

We think that there was nothing on the face of the paper or in the facts shown to warrant the court in holding as matter of law, as it did, that the obligations were received by Brooks and the advances made on them *mala fide*. That is the effect of the ruling at the trial, and the conclusion was not supported by the facts.

It follows that the judgment must be reversed and a new trial granted, costs to abide the event.

BARTLETT, J. (dissenting).

McNamara v. Jose (1902), 28 Wash. 461.

Appeal from Superior Court, King county.—Hon. GEORGE MEADE EMORY, Judge.

John E. Humphries and Harrison Bostwick, for appellant.
William Parmerlee, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The respondent brought this action against the appellant and one Thomas Carstens to recover upon a promissory note of which the following is a copy:

"\$1,000.

SEATTLE, WASH., Dec. 28th, 1899.

"On or before July 1, 1900, after date, (without grace) I promise to pay to the order of James Daly, one thousand dollars, for value received, payable only in United States gold coin.

"Payable at Cape Nome.

"JOSE & CARSTENS,

"Per Alfred Jose."

He alleged in his complaint that he purchased the note from the James Daly named therein as payee, prior to its maturity, for a valuable consideration, without notice or knowledge of "any defenses or equities, existing in favor of defendants, and against said Daly." The appellant alone answered. He denied all of the allegations of the complaint, and alleged affirmatively, in substance, that the note was given Daly as part of the purchase price of a certain lot situated in the town of Nome, Alaska, to which Daly had no title, and to which he falsely and fraudulently represented he had title as an inducement to the appellant to purchase the same, all of which was well known to the respondent at the time he purchased the note from Daly. At the trial of the cause the respondent called the appellant as a witness, who testified that he executed the note personally, that Carstens had not authorized him to sign his (Carstens) name thereto, and, while he believed he had authority to so sign it at the time, he did not in fact have such authority. On this being shown, the respondent dismissed as to Carstens, and the action proceeded against the appellant. At the conclusion of the evidence the court took the case from the jury, and directed a judgment to be entered in favor of the respondent against the appellant for the full amount of the note. The errors assigned raise the question of the correctness of this ruling.

From the evidence the jury could have well found that the note was procured by Daly from the appellant through his misrepresentations as to his title to the property deeded as a consideration for the note. It must, therefore, for the purposes of this appeal, be taken as established that the appellant has a defense to the note as against Daly, or against any one taking the note from him with knowledge of its infirmity or defect, "or knowledge of such facts that his action in taking the instrument amounted to bad faith." Session Laws 1899, p. 350, § 56. The circumstances under which the respondent received the note appear from his own testimony. He not only testified in his own behalf, but was called by the appellant, and subjected to a most searching examination. In brief, his story is that he purchased the note from Daly some three months after its execution, paying him therefor \$470 in cash, and cancelling an account he held against him of \$30, making \$500 in all; that he knew both Jose and Carstens at the time, and knew them to be solvent; that he made no inquiry other than of Daly as to the consideration for the note; that he made no inquiry of either Jose or Carstens concerning it, and had no notice of any infirmity in the instrument, or that the appellant had published a warning against its purchase; and that, if he had, he would not have purchased it. That when Daly first mentioned the note to him it was in the hands of one Thomas McCorey, whom Daly said he had bargained it to for \$700, but did not think he had effected a sale, as he did not believe McCorey could raise the money; that he first asked him \$700 for the note, but finally consented to take the amount paid; that he noticed the note was payable at Cape Nome, and he did not think it strange that Daly would sell the note for \$500, "as he was the kind of a fellow that wanted that much money at that time." While it was shown that the respondent had a place of business, the character of that business—whether or not he made it his business, or a part of his business, to discount commercial paper—does not appear. There is nothing in the record, however, that questions his repute, and his statements as to the circumstances under which he obtained the note are not called in question.

The Negotiable Instruments Act of this state (Laws 1899, p. 350, § 52) defines a holder in due course of a negotiable instrument to be one who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face: (2) that he became the holder of it before it was overdue, and without

notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The act further provides (Id. § 56) that, to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith;" and (Id. § 57), that "a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." But, notwithstanding this act positively provides that, to constitute notice of an infirmity in a negotiable instrument, the purchaser must have knowledge of such facts that his action in taking the instrument amounted to bad faith, we cannot think that the legislature meant to say that a purchaser of a negotiable instrument can shut his eyes to the surrounding circumstances, remain in willful ignorance of facts which would have made known to him the infirmities of the instrument he purchases, and then claim, because he had no actual knowledge of such infirmities, that his title thereto is unimpeachable; but that it is still the rule that willful ignorance and guilty knowledge alike involve the result of bad faith. This, however, does not mean that the holder's title is to be overthrown by slight circumstances. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. His rights are to be determined by the simple test of honesty and good faith, not by a speculative inquiry into diligence or negligence. Although he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title will prevail. Crawford, Negotiable Instruments Law (2d. ed.), p. 54.

"Suspicion of defect of title or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part." *Murray v. Lardner*, 2 Wall. 110.

Tested by these rules, is there anything in the evidence before

us, which required the submission of the cause to the jury? We think not. Laying aside the fact that it was purchased at such a large discount there is nothing that even tends to show bad faith on the part of the appellant, and this one fact loses much of its persuasiveness when it is remembered that the note is payable at Cape Nome, which the court judiciously knows is on the coast of Alaska, inaccessible for a greater portion of the year, and not at any time in the line of regular communication. It certainly would not be sought by investors in commercial paper so long as there was a possibility of their being compelled to enforce its payment at that place. Again, the purchase of a note at a discount is not of itself, under ordinary circumstances, evidence of bad faith. When it is very large, that circumstance may be considered in connection with other circumstances in determining the question of the purchaser's good faith; but unless the consideration be merely nominal, or so grossly inadequate as to lead to the conclusion that the purchase is made for the purpose of speculating upon the chances of collection, it is not of itself sufficient to justify a finding of bad faith.

The appellant makes some question on the order in which the court admitted the proofs. He also contends that the recovery should be limited to the amount the respondent paid for the note. The first, if error at all, could not operate to the prejudice of the appellant, and the second, whatever may have been the former rule, is now settled against this contention by our Negotiable Instruments Act. Laws 1899, p. 350, § 57.

The judgment is affirmed.

REAVIS, C. J., and WHITE, HADLEY, ANDERS, MOUNT and DUNBAR, JJ., concur.

DeWitt v. Perkins (1868), 22 Wis. 451. §§ 54-3, 58.

Appeal from the County Court of Milwaukee County.

Action on defendant's promissory note. The jury, by direction of the court, found for the plaintiff; and the defendant appealed from the judgment. The question in dispute will sufficiently appear from the opinion.

E. Mariner and *David S. Ordway*, for appellant.

Geo. W. Lakin, for respondent.

DIXON, C. J.—The plaintiff, knowing the defendant, and that he was in fair credit and able to respond, purchased, shortly

before its maturity, a promissory note against him for three hundred dollars and interest for six months, paying therefor only the sum of *five dollars*. As between the defendant and the payee, the note was invalid for want of consideration. Is the plaintiff a *bona fide holder for value*, so as to protect him against the defense of a want of consideration? We answer, no. The consideration paid by him was merely nominal. It is as if the note had been given to him, and he should claim the protection afforded a *bona fide* holder for value. It appears on the face of the transaction that it was not a negotiation of the note in the usual course of business, but that the sum exacted on the one side and paid on the other was to give that the semblance of a sale, which otherwise was intended as a mere gift, or, what is worse, a shift to get the note out of the hands of the payee so as to cut off the defense of the maker, for the payee's benefit. Either view is equally fatal to the action of the plaintiff, provided the defense of a want of consideration is established.

Again, the buying of a note against a solvent maker, the purchaser knowing him to be such, for a mere nominal consideration, is very strong, if not conclusive, evidence of *mala fides*. It is constructive notice of the invalidity of the note in the hands of the seller—such as to put the purchaser upon inquiry, which if he fails to make, he acts at his peril. (*Brown v. Taber*, 5 Went., 566; *Mathews v. Poythress*, 4 Ga., 287, 299 et seq., and cases cited; *Anderson v. Nicholas*, 28 N. Y., 600; *Whitbread v. Jordan*, 1 Younge & Collyer [Exch.], 303, 328; *Jones v. Smith*, 1 Hare, 68; 1 Parsons on Notes and Bills, 254, 259-60). The proof offered to show a failure of consideration should have been received, and the case submitted to the jury on this ground.

Judgment reversed, and a new trial awarded.

PAYEE AS HOLDER IN DUE COURSE.

§ 54.

Boston Steel and Iron Co. v. Steuer (1903), 183 Mass. 140,
97 Am. St. Rep. 426.

Contract for \$1,823.25 for work done and materials furnished for a building of the defendant numbered 811 on Beacon street in Boston. Writ dated April 11, 1899.

At the trial in the Superior Court before Bishop, J., without a jury, the judge excluded certain evidence offered by the defend-

ant and refused to make certain rulings requested by the defendant. He found for the plaintiff in the sum of \$2,043.86; and the defendant alleged exceptions.

E. Greenhood, for the plaintiff.

J. K. Berry, for the plaintiff.

LORING, J.—The only question in issue between the parties in this case is the right of the defendant to be credited with two sums of \$200 and \$400, respectively, under the following circumstances:

On December 31, 1898, the defendant's husband owed the plaintiff \$1,781.30, for iron work furnished by it to him in the construction of a house number 819 Beacon street. On being pressed for payment, the defendant's husband, on January 21, 1899, delivered to the plaintiff the defendant's check for \$200. payable to the plaintiff. It is stated in the bill of exceptions that on February 2, 1899, "he paid the plaintiff the further sum of \$400 in a check made by said Jennie D. Steuer." But it appears from the auditor's report, which was before the court and is referred to in the bill of exceptions, that the plaintiff's manager's name was Newcomb, and that his story was that the check for \$400 "was brought to him at his office on Devonshire street by Mr. Steuer in response to further demands for money, and that it was made out in blank and filled up by himself, Mr. Steuer being unwilling that it should be made for more than two hundred dollars, while Mr. Newcomb insisted that it should be for the larger amount and so made it, with Mr. Steuer's consent, and applied it to his debt." The defendant's story was "that she gave the check to Mr. Newcomb at her house."

In addition to the iron furnished the defendant's husband for 819 Beacon Street, the defendant's husband had ordered two iron columns and a base plate from the plaintiff for another house, No. 811 Beacon Street, which the plaintiff supposed was Steuer's until his manager was told on March 10 that it belonged to the defendant's wife. These two columns and base plate were delivered on December 22, 1898, and at the rate charged in the bill of items were worth \$150.35. From December to March there were negotiations between the defendant's husband and the plaintiff for a contract by which all the iron work for 811 Beacon Street should be furnished by the plaintiff for a fixed sum, payments on account to be made as each floor was finished; and on or about March 1, 1899, the plaintiff's manager submitted to the defendant a written contract to this effect. On March 10 this

was returned by the defendant's husband with the statement already referred to, that 811 Beacon Street belonged to his wife, and that the contract should be made with her. No written contract was ever made between the plaintiff and the defendant, but the plaintiff went forward and delivered the iron work for two of the six stories of the house, part being delivered before March 10 and part after that date. The last was delivered on March 18, when the plaintiff stopped because it had not been paid for what it had done. Thereupon this action was brought to recover the reasonable value of the materials furnished and work done.

At the trial the defendant contended "that the amount of said payments should be credited to her in this action on the ground that they were payments required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon Street, and that the checks were given to her said husband, as her agent, to make such payments," and "offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or any one representing him, and claimed that the same should be admitted in evidence. The court declined to admit the same and the defendant duly excepted to the exclusion." The other exceptions taken at the trial have been waived, and the question raised by this exception is the only matter now before us.

The plaintiff has argued that it did not appear but that these instructions were given in a private conversation between husband and wife. But on a fair construction of the bill of exceptions we do not think that the evidence can be taken to have been excluded on that ground. It is stated there that the "defendant offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or any one representing him." This must be taken to be a statement of the ground of the objection, and the ruling must be taken to be a ruling that competent evidence was offered and was excluded because not made in the presence of the plaintiff or of some one representing it.

The judge before whom the case was tried without a jury found "that neither of said payments was required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon Street, and that neither of them was made according to any agreement for payment to be made on account of said 811 Beacon Street, and that no floor in said building was completed at the time either of said payments was made, and that said payments were made by said Bernard Steurer on account

of his building numbered 819 Beacon Street, and were received by the plaintiff on account therefor."

This finding makes the evidence excluded immaterial so far as the check for \$200 is concerned. If this evidence had been admitted, the defendant's case on the \$200 check would have been this: A check payable to the plaintiff is handed by the drawer to her husband, to be delivered by him to the plaintiff in payment of a debt to become due from the drawer of the check to the payee, and is fraudulently handed by the husband to the payee of the check, in payment of a debt due from him to the payee, and is accepted by the payee in good faith in payment of that debt.

In such a case the payee of the check is a *bona fide* purchaser of the check for value, without notice, and the drawer could not set up her husband's fraud in defense of the check, nor maintain an action for money had and received after payment of it on discovering the fraud.

The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a *bona fide* purchaser of it at common law, with all the rights incident to a purchaser for value thereof without notice. That was decided in *Watson v. Russell*, 3 B. & S. 34, and affirmed in the Exchequer Chamber in the same case. 5 B. & S. 968. To the same effect are *Poirier v. Morris*, 2 El. & Bl. 89; *Nelson v. Cowing*, 6 Hill, 336, 339; *Munroe v. Bordier*, 8 C. B. 862, and *Armstrong v. American Exchange Bank*, 133 U. S. 433, 453. The case of *Fairbanks v. Snow*, 145 Mass. 153, might have been decided on this ground but was disposed of on common law principles.

That payment of a pre-existing debt makes the holder a purchaser for value in this Commonwealth was settled law before the negotiable instruments act was enacted. (*Blanchard v. Stevens*, 3 Cush. 162; *Stoddard v. Kimball*, 6 Cush. 469; *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189, 199; *National Revere Bank v. Morse*, 163 Mass. 383; *Holden v. Phoenix Rattan Co.*, 168 Mass. 570).

The checks in question in the case at bar were given after the negotiable instruments act (St. 1898, c. 533; R. L. c. 73) went into effect, and are governed by its provisions. The plaintiff is a holder in due course of the \$200 check within R. L. c. 73, § 69. This section is taken from § 29 of the English bills of exchange act of 1882, and *Watson v. Russell* is cited in *Chalmers, Bills of Exchange*, (5th ed.) 89, as an example of a person who is a holder in due course within that section.

It was stated by Lord Russell in *Lewis v. Clay*, 67 L. J. Q. B. (N. S.) 224, that a payee of a promissory note cannot be a holder in due course within § 29 of the English bills of exchange act of 1882. In *Herdman v. Wheeler*, [1902] 1 K. B. 361, 372, it was pointed out that this statement of Lord Russell's was *obiter*, and it was also pointed out that in *Herdman v. Wheeler*, as in *Lewis v. Clay*, it was not necessary to pass on that point. The case of *Watson v. Russell*, 3 B. & S. 34; S. C. 5 B. & S. 968, does not seem to have been brought to the attention of the court in either of these cases. And in neither case does the court seem to have taken into consideration the practice of a check being procured drawn by another to be used in paying a debt due from the person procuring the check to the person to whom the debtor has had the check made payable. The practice is recognized in case of foreign bills of exchange, and the person procuring the bill is known technically as the remitter of it. See *Munroe v. Bordier*, 8 C. B. 862, where it was held that the payee of a foreign bill, who took it from the remitter of it for value, was a *bona fide* purchaser for value. It was this practice which was applied in *Watson v. Russell*, 3 B. & S. 34, in case of a check. In our opinion, a check received by the payee named in it, in payment of a debt due from the remitter of the check, is received by a holder in due course within § 69 of the negotiable instruments act, St. 1898, c. 533, R. L. c. 73, and that it is so even if we should follow the decision made in *Herdman v. Wheeler*, [1902] 1 K. B. 361, and hold that a payee never can be a holder in due course to whom the bill has been "negotiated" within the last clause of § 31 of our act, R. L. c. 73, which is taken from § 20 of the English bills of exchange act of 1882 (45 & 46 Vict.) c. 61. The rule that payment of a pre-existing debt makes the holder a holder for value was adopted in R. L. c. 73, § 42.

But so far as the check for \$400 is concerned, we are of opinion that the evidence should have been admitted. If the defendant's story were found to be true, namely, that she handed the check to the plaintiff's manager at her house, this check would stand on the same footing as the other. But the story of the plaintiff's manager was that the check was brought to him by the defendant's husband, signed in blank by the defendant, and that it was filled up by him for the sum of \$400, with the husband's consent. We assume in favor of the plaintiff that this is to be interpreted to mean that the only blank in the check, when it was brought to the plaintiff's manager by the defendant's husband, was in the amount for which it was to be drawn.

It had been held in England before the bills of exchange act in 1882, that such a piece of paper is not a check; that one who buys it buys an incomplete instrument and his rights depend upon the real authority which the signer had in fact given in the matter. *Awde v. Dixon*, 6 Exch. 869. See also *Hatch v. Searles*, 2 Sm. & G. 147; *Hogarth v. Latham*, 3 Q. B. D. 643; *Watkin v. Lamb*, 85 L. T. (N. S.) 483; *France v. Clark*, 26 Ch. D. 257, 262. And see *Ledwich v. McKim*, 53 N. Y. 307. Such an incomplete instrument is *prima facie* authority to fill in the blank. *Crutchly v. Mann*, 5 Taunt. 529; *Swan v. North British Australasian Co.*, 2 H. & C. 175, 184. But this *prima facie* authority, as we have said, may be met by evidence of what authority was in fact given, as was done in *Awde v. Dixon*, 6 Exch. 869. If the blanks are filled up before the instrument is negotiated, it does not lie in the maker's mouth to set up that it was incomplete when delivered by him. In such a case, a plaintiff who buys for value without notice gets the rights of a *bona fide* purchaser for value of a negotiable instrument; and the fact that there was no authority for filling up the blanks as they were filled up, or the fact that the paper was otherwise wrongfully dealt with, is no defence. *Schultz v. Astley*, 2 Bing. N. C. 544; *Foster v. Mackinnon*, L. R. 4 C. P. 704, 712.

In this Commonwealth it was held on the other hand that a note with a blank for the payee's name was a promissory note and not an incomplete paper which might be made into a promissory note. *Ives v. Farmers' Bank*, 2 Allen, 236. And in *Frank v. Lilienfeld*, 33 Gratt. 377, it was held that the purchaser in good faith of a note in printed form indorsed by the defendant, where the date, payee's name and amount had been left blank, had an absolute right to fill in the amount advanced thereon and to fill up the other blanks. It also has been held here, as it has been held in England, that such a blank, in the absence of other evidence, might be filled in by a *bona fide* purchaser; see *Androscoggin Bank v. Kimball*, 10 Cush. 373; and that a *bona fide* purchaser of such a paper which is filled before it is negotiated, has the rights of a purchaser for value without notice. See *Whitmore v. Nickerson*, 125 Mass. 496; *Binney v. Globe National Bank*, 150 Mass. 574. See also in this connection *Herdman v. Wheeler*, [1902] 1 K. B. 361.

It is not necessary to consider how a blank check would be dealt with in Massachusetts at common law, where the amount in place of the name or date is lacking. The negotiable instruments act, R. L. c. 73, § 31, adopted the English law on this

point, and it follows that if Newcomb's story is to be believed, the blank check brought to him must be treated as an incomplete instrument and not as a check.

The defendant further contends that it was inadmissible to show the real authority given to the husband in the absence of the plaintiff, and cites in support of that contention *Markey v. Mutual Benefit Ins. Co.*, 103 Mass. 78, 93, and *Byrne v. Massasoit Packing Co.*, 137 Mass. 313. These are cases where the act done was within the ostensible scope of the authority given an agent, and for that reason the real authority could not be invoked. The only act relied on as giving ostensible authority to the husband in the case at bar was putting him in possession of the blank check. There was no more ostensible authority here than there was in *Awde v. Dixon*, 6 Exch. 869; *Hogarth v. Latham*, 3 Q. B. D. 643, or *Watkin v. Lamb*, 85 L. T. (N. S.) 483. An incomplete check gives an authority to fill it up which is only a *prima facie* authority. It does not import an ostensible authority to fill it up which is absolute.

The plaintiff's rights under the blank check for \$400, and to the money received for it, depend upon the authority actually given by the defendant when she signed it, and the evidence offered should have been admitted in respect of the credit claimed for the \$400 paid under the blank check.

The entry must be,

Exceptions sustained.

WHEN PERSON NOT DEEMED HOLDER IN DUE COURSE. § 55.

La Due v. Bank of Kasson (1883), 31 Minn. 33.

Appeal by plaintiff from an order of the district court for Dodge county, refusing a new trial,—after a trial by Buckham, J., a jury being waived. The case is stated in the opinion.

Jones & Gove, for appellant.

Chas. C. Willson, for respondent.

MITCHELL, J. At Kasson, Minnesota, on the 15th of October, 1881, the defendant drew its draft or bill of exchange for \$500 on the Ninth National Bank of New York, payable on demand, to the order of plaintiff, and, for value, delivered the same to the payee, who, on the same day, indorsed it to one Edison, who held

it until the 8th of March, 1882, without presentation for payment, and, on the day last named, indorsed it to one Jordan, who, on the 11th of the same month, indorsed it to the Exchange Bank of Louisiana, Missouri, which caused it to be presented for payment on the 15th of the month, when payment was refused, and the draft protested. On the 4th of April, the Exchange Bank transferred it to plaintiff. No explanation is given why Edison held the draft so long without presenting it for payment, nor does it appear that either Jordan or any of the subsequent indorsee's asked for any explanation of this fact when they purchased it. In October, 1881, immediately after the draft in question had been transferred to him, Edison absconded from the state, leaving debts unpaid, among which was a promissory note for \$500 and interest, dated September 26, 1881, payable in 30 days to the order of defendant bank, and which it then held and still holds, and which has never been paid. About the first of November, 1881, the defendant, having ascertained that Edison was the owner of the draft in question, notified the drawee not to pay it. This last fact is, perhaps, not material. Upon being sued upon the draft, the defendant now seeks to set off against it the promissory note against Edison already referred to, and the only question in the case is whether, under the facts stated, this can be done. It may be here remarked that La Due, the payee, was clearly discharged from liability as indorser, by the delay of five months in presenting the draft for payment; hence, he can claim no rights as an indorser who has been compelled to pay. His purchase of the draft from the Exchange Bank was a purely voluntary act, and he has now no greater rights under it than if he had never before been a party to the instrument.

According to the commercial law in England, and in probably all those states where a different rule has not been fixed by statute, an indorsee of an overdue bill or negotiable note takes it subject only to such equities or defences as attached to the bill or note itself, and not to claims arising out of collateral matters or independent transactions, whether they arose against the payee or an intermediate holder; the idea being that such commercial paper, although overdue, did not lose its negotiability. Our state, following the example of many others, has by statute entirely changed this rule. Gen. St. 1878, c. 66, § 27, provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill

of exchange, transferred in good faith and upon good consideration before due." The effect of this statute, clearly, is to place an overdue bill or note upon the same footing as any other chose in action, and, if it be assigned after due, a set-off to the amount of the note or draft may be made of any demand existing against any person who has assigned or transferred such note or bill after it became due, if the demand is such as might have been set off against the assignor while the note or bill belonged to him. A set-off arising out of an independent transaction against an intermediate holder is thus placed upon the same footing as an equity attaching to the bill or note itself against the original payee. This same rule is laid down, in somewhat different language, in the provision regarding set-off in justice's court. Gen. St. 1878, c. 65, § 40. To illustrate, suppose Edison had been the payee, and had obtained the draft by fraud and without consideration, or had received payment on it while he owned it, but by oversight or mistake it remained in his hands. These would have been defences attached to the draft itself, as between the original parties, and, if the draft was overdue when Edison indorsed it to Jordan, defendant could have set them up even under the former rule against the draft in the hands of Jordan, or those to whom he subsequently transferred it. But now, under the statute, defendant could set off this note, although it arises out of an independent matter, against an intermediate holder, because it is a demand which might have been set off against Edison while the draft belonged to him, had he sued on it. *Linn v. Rugg*, 19 Minn. 145, (1881); *Martin v. Pillsbury*, 23 Minn. 175; *Harris v. Burwell*, 65 N. C. 584.

Such a rule may render precarious the business of dealing in overdue paper, especially when it has passed after maturity through the hands of several holders. The policy of such a law is exclusively for the legislature, but we may suggest that we see no reason why overdue commercial paper should not be placed on the same footing as any other chose in action. Notes and bills of exchange are only treated as business paper when negotiated before maturity. When overdue they are dishonored. In the principal commercial states of the Union, such as New York, this same rule has long been established by statute. Hence, our state cannot be charged with having adopted a rule in opposition to the judgment or usages of the business world.

The only question left, then, is whether this draft was overdue when Edison indorsed it to Jordan on the 8th of March, 1882, four months and twenty-three days after its date.

In the case of a bill, note, or check, payable on demand, no exact day of payment is fixed in the instrument. The general rule is that it must be presented for payment within a reasonable time, having in view ordinary business usages, and the purposes which paper of that class is intended to subserve.

The term "overdue," as applied to a demand bill of exchange, is used in different connections, in each of which it has a different meaning; and the failure to keep these distinctions in mind has perhaps led to some misapprehension regarding the present case. Sometimes it is used in reference to a right of action against a drawer or indorser. In that connection a bill is not overdue until presented to the drawee for payment, and payment refused. Sometimes the term is used in considering whether an indorser has been released by a failure of the holder to present the bill for payment, and to give the indorser notice of its dishonor within a reasonable time. Again, the term is applied to a bill which has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defences which the drawer had against it in the hands of the assignor. It is in this last connection that the term "overdue" is considered in the present case. That in this case a bill may be said to be overdue, although it has never been in fact presented to the drawee for payment, is recognized everywhere throughout the books, and will be apparent, we think, on a moment's reflection. Suppose a draft has been held by the payee five years, without ever having been presented to the drawee for payment, and is then indorsed to another party. It would not be due so as to give a right of action against the drawer, because his contract is only to pay in case it is not paid by the drawee on presentation. But there would be no doubt that it would be overdue or dishonored, so as to charge it in the hands of the indorsee with any defences which the drawer had against it in the hands of the payee, although, when he took it, it had never been presented for payment. The retention of a demand draft so long a time without presentation, when no defence exists against it, is so unusual and contrary to business usages that this circumstance would be held to charge the indorsee with notice when he purchased the draft that it was dishonored. The lapse of time would in such case be so great as to put a purchaser upon inquiry as to the reason why it was still outstanding and unpaid.

The cases are almost innumerable in which it has been held that paper payable on demand had been outstanding so long when transferred, as to be deemed overdue and dishonored, so as to

subject it, in the hands of the purchaser, to any defences which the maker or drawer had against it in the hands of the payee; and in none of these cases is the question whether or not the paper had been, before the transfer, presented for payment to the maker or drawee, referred to as at all material. *Down v. Halling*, 4 B. & C. 330; *First Nat. Bank v. Needham*, 29 Iowa, 249; *Cowing v. Altman*, 71 N. Y. 435; *Sylvester v. Crapo*, 15 Pick. 92; *Ranger v. Carey*, 1 Met. 369; *Herrick v. Wolverton*, 41 N. Y. 581; Story on Prom. Notes, § 207 and note; *Thompson v. Hale*, 6 Pick. 258; *American Bank v. Jenness*, 2 Met. 288; *Carlton v. Bailey*, 27 N. H. 230; *Parker v. Tuttle*, 44 Me. 459; *Nevins v. Townsend*, 6 Conn. 5; *Camp v. Scott*, 14 Vt. 387; *Morey v. Wakefield*, 41 Vt. 24.

That in determining whether an indorsee took a demand note or bill as dishonored and overdue paper, subject to all equities or defences, the test is the length of time it has been outstanding, and not whether it has in fact been presented for payment, may be illustrated in another way. Suppose a draft had in fact been presented for payment, and payment refused, on the very day it was issued, it would then be overdue as to the drawer, so that an action would then lie against him. But suppose, immediately after such presentation, and on the same day, the holder should indorse the draft to another, who took it in good faith, for value, without notice of this actual dishonor; clearly such indorsee would not take it as overdue paper, subject to the equities or defences against it in the hands of the former holder, because, a reasonable time for its presentation not having expired, there was nothing to put him upon inquiry, or to charge him with notice of such equities. *Himmelman v. Hotaling*, 40 Cal. 111. In fact, in determining whether an indorsee takes such paper as overdue paper, subject to such defences or equities, the question of actual demand and dishonor does not enter into the discussion. The point of inquiry is, had the paper been outstanding so long after its date as to put the purchaser upon inquiry, and charge him with notice that there is some defence to it? In view of the well-known fact that bills of exchange are not always transmitted immediately for payment, but first pass through the hands of several intermediate holders in the ordinary course of business, and in other cases are purchased by travellers to be carried with them instead of currency or coin, to be negotiated as occasion may require, we are not disposed to lay down any narrow rule on this subject. But in this case we think that the fact that this draft was, without any explanation of the reason, found outstanding nearly five months

after its date, fully justified the trial court in holding it overdue and dishonored when Jordan took it, so as to charge it in his hands, or the hands of those who hold under him, with any defence or set-off which the drawer had against it in the hands of Edison.

Order affirmed.

Dresser v. Missouri etc. R. R. Const. Co. (1876), 93 U. S. 92.

Error to the Circuit Court of the United States for the District of Iowa.

Submitted on printed arguments by *Mr. James Grant*, for the plaintiff in error, and by *Mr. George G. Wright*, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

This action is brought upon three several promissory notes made by the Missouri and Iowa Railway Construction Company, dated Nov. 1, 1872, payable at two, three, and four months, to the order of William Irwin, for the aggregate amount of \$10,000.

The defence is made that they were obtained by his fraudulent representations.

But a single point requires discussion. Conceding that the present plaintiff received the notes before maturity, and that his holding is *bona fide*, the question is as to the amount of his recovery.

Under the ruling of the court he recovered \$500. His contestation is, that he is entitled to recover the face of the note, with interest.

After the evidence was concluded, the plaintiff asked the court to charge the jury, that if they believed, from the evidence, that the plaintiff purchased the notes in controversy of William Irwin for a valuable consideration, on the 1st of November, 1872, and paid \$500, part of the consideration, on 21st of January, 1873, before any notice of any fraud in the contract, he was entitled to recover the whole amount of the notes; and the court refused this instruction. But the court charged the jury,—

“That, in the first place, the jury must find that there was fraud in the inception of the notes as alleged; and that if the defendants failed to satisfy the jury of that fact, the whole defence fails.

That if the fact of fraud be established, and the jury find

from the evidence that the plaintiff paid \$500 upon the notes without notice of fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only *pro tanto*; that is, to the amount paid before he received notice."

It does not appear that, upon the purchase of the notes in suit, the plaintiff gave his note or other obligation which might by its transfer subject him to liability. His agreement seems to have been an oral one merely,—to pay the amount agreed upon, as should be required; and he had paid \$500, and no more, when notice of the fraud was brought home to him.

The argument of the plaintiff in error is that negotiable paper may be sold for such sum as the parties may agree upon, and that, whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true, and if the plaintiff had bought the notes in suit for \$500, before maturity and without notice of any defence, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the note would have passed to him, and he could have recovered the full amount due upon them. (*Fowler v. Strickland*, 107 Mass. 552; *Park Bank v. Watson*, 42 N. Y. 490; *Bank of Michigan v. Green*, 33 Iowa, 140). The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which \$500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly, that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts generally. In the case of the sale of real estate for a sum payable in instalments, and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards. (*Barnard v. Campbell*, 53 N. Y. 73; *Lewis v. Bradford*, 10 Watts, 82; *Juvenal v. Jackson*, 2 Harris, 529; *id.* 430; *Youst v. Martin*, 3 S. & R. 423, 430).

In *Weaver v. Barden*, 49 N. Y. 291, the court use this lan-

guage: "To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration; that is, for value paid. Where a man purchases an estate, pays part and gives bonds for the residue, notice of an equitable incumbrance before payment of the money, though after giving the bond, is sufficient. (*Touville v. Naish*, 3 P. Wms. 306; *Story v. Lord Windsor*, 2 Atk. 630). Mere security to pay the purchase price is not a purchase for a valuable consideration. (*Hardingham v. Nicholls*, 3 Atk. 304; *Maundrell v. Maundrell*, 10 Ves. 246, 271; *Jackson v. Cadwell*, 1 Cowen, 622; *Jewell v. Palmer*, 7 J. C. 65). The decisions are placed upon the ground, according to Lord Hardwicke, that if the money is not actually paid the purchaser is not hurt. He can be released from his bond in equity."

The plaintiff here occupies the same position as the *bona fide* purchaser of the first of a series of notes, of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no farther.

Upon receiving notice of the fraud, his duty was to refuse further payment; and the facts before us required such refusal by him. Authorities *supra*.

Crandell v. Vickery, 45 Barb. 156, is in point. Holdridge had obtained the indorsement by Vickery of his (Holdridge's) notes by false and fraudulent representations. These notes were transferred to Crandall without notice or knowledge of the fraud, he giving to Holdridge several checks for the amount, upon the understanding that they were not to be presented for payment, but when the money was wanted, he was to give new checks as needed. Before giving the new checks, plaintiff was informed of the fraud, and requested not to make payment, or to give his checks. He did, however, give his new checks, according to the original agreement, and brought suit upon the notes against Vickery, the indorser.

It was held that he was not a *bona fide* holder, for the reason that the transaction was executory when he received notice of the fraud; that he had then parted with no value; that the real obligations were given afterwards, and under circumstances that afforded no protection.

That case is stronger for the holder than the one before us, in the fact that checks were there given on the original transaction, which might have been presented or passed off to the pre-

judice of the maker ; while here the transaction was oral throughout.

To the same purport in principle, although upon facts somewhat different, are the cases of *Garland v. The Salem Bank*, 9 Mass. 408; *The Fulton Bank v. The Phoenix Bank*, 1 Hall, 562, and *White v. Springfield Bank*, 3 Sandf. S. C. 227.

The cases are numerous that where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without consideration, as collateral security, he holds for the amount advanced upon it, and for that amount only. (*Williams v. Smith*, 2 Hill, 301).

In *Allaire v. Hartshorn*, 1 Zab. 663, the case was this: Hartshorn sued Allaire on a note of \$1,500 at ninety days, made by Allaire. It was proved that the note had been misapplied by one Pettis, to whom it had been entrusted; that he had pledged to the plaintiff as security for \$750 borrowed of him on Hegeman's check, and also as security for a \$400 acceptance of another party then given up to Pettis.

On the trial, the court charged the jury, that, if any consideration was given by the plaintiff for the note, "they should not limit their verdict to the amount so given, but should find the whole amount due on the face of the note." The case was carried to the court of errors and appeals of the State of New Jersey, upon an exception to this charge. The court reversed the judgment, holding that, although a *bona fide* holder, Hartshorn could recover only the amount of his advances.

The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser.

No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any. The judgment below is based upon authority, and upon the soundest principles of honesty and fair dealing.

It has our concurrence and is affirmed.

FRAUD AMOUNTING TO WANT OF CONTRACT; WHEN TITLE
DEFECTIVE.

§ 57.

Porter et al. v. Hardy et al. (1901), 10 N. D. 551. §§ 126, 127.

Appeal from District Court, Wells county; GLASPELL, J.

Action by Frank J. Porter and others, doing business under the firm name of Porter, Melick & Co., against L. M. Hardy and

others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

George A. Bangs and Cochrane & Corliss, for appellants.
F. Baldwin, for respondents.

YOUNG, J.—Plaintiffs, for cause of action, allege that on May 5, 1893, the defendants executed and delivered their promissory note, dated on that day, wherein, for value received, they promised to pay one E. Cooper, or order, \$700, on October 1, 1894, \$700 on October 1, 1895, and \$600 on October 1, 1896, with interest at the rate of 8 per cent. per annum until paid, payable annually; and that plaintiff is indorsee in due course of said note; and that the same has not been paid. The defendants, who are ten in number, answer jointly. Broadly stated, their defense is that they did not execute the note sued upon. The answer admits the genuineness of their signatures, but alleges a fraudulent and material alteration of the instrument to which such signatures were originally attached, and a total want of consideration. The trial was to the court without a jury, under § 5630, Rev. Codes, 1899. Judgment was ordered and entered for defendants. Plaintiff has appealed from the judgment, and in a statement of case settled under said section has specified for retrial by this court the eighteenth finding of fact made by the trial court, which finding is that “the defendants in signing said paper in the manner and form in which it was presented to them, were not guilty of negligence.” All other findings of fact are conceded to be correct.

The following facts material to a determination of the questions presented by this appeal are established by the findings which are unchallenged: On or about May 5, 1893, one R. A. Whitehead had a number of imported stallions at Carrington, in Wells county. The stallions were owned by E. Cooper, who was a breeder and importer of blooded stallions, residing near Adrian, Minn. Whitehead, who was Cooper’s agent to sell said stallions, solicited these defendants, who were farmers residing in the vicinity of Carrington, to organize a stock company with a capital stock of \$2,000, for the purpose of purchasing one of these stallions. The contemplated purchase was conditioned upon the organization of the company and an examination of the stallion. The defendants agreed with Whitehead that they would meet and try to form a stock company if a sufficient number of farmers would meet with them, and the said Whitehead thereupon produced a book, which was so bound in the middle that upon being opened the two pages appeared to be one continuous statement or con-

tract, and said statement or contract was so punctuated that it would show one continuous instrument; whereas in fact the leaves of the book were so perforated that they could be detached down in the binding, but in such a manner as not to be easily perceptible. Said Whitehead requested the defendants to sign said statement or contract, stating and representing to them, and each of them, that all he wanted was their names to show that they were willing to meet and form a stock company, and that when he got names enough he would notify them, and have them meet for that purpose. He also represented that the memorandum of agreement was to the effect that the signers thereof would meet, and form a stock company, and, if organized, they would buy a horse, and give three notes therefore to E. Cooper, if, on examination, they were satisfied with the horse; and it was agreed that they were not to execute and deliver their promissory note until said organization was duly effected, and a horse bought. Relying upon these representations, the defendants signed the printed document contained in the book referred to. In said book commencing upon the upper page, and ending at the bottom of the lower page, were the following words and figures, when signed by these defendants, to wit:

Stock Contract.

We, the undersigned stockholders, realizing the necessity of improving our horses, do hereby associate ourselves together to buy of E. Cooper the imported.....stallion.....
 No. said is
 guaranteed to be a breeder. Certificate of registry to accompany
 the horse. Capital Stock,
 \$2,000.00.

May 5, 1893.

For value received we, or either of us, promise to pay to.....
 or order.....dollars on the first day of.....189., and.....
 dollars on the first day of.....189., and.....dollars on the
 first day of.....189., Bank of....., with interest at.....
 per cent. per annum from date until paid, payable annually.

Here followed the signatures of the defendants.

That portion of the contract above set out down to the words "Capital Stock," and including the same, was upon the upper page, and the rest was upon the lower page. Between the pages, and close under the bound portion of the book, were perforations, by which the lower page could be detached. This book was presented to the defendants for their signatures while they were at work in their fields. All of them were able to read and

write, and they all read the paper hereinbefore set out before signing the same and they understood its general purpose. Whitehead, however, opened the book but partially, and because of the way in which it was bound it was almost impossible to notice the perforations. Thereafter, Whitehead, without the knowledge or consent of these defendants, or any of them, tore off the lower page, containing the signatures of these defendants, and filled in the blanks so as to form the note sued upon, which note omitting the signatures, reads as follows:

\$2,000.00

New Rockford, N. Dak.,

May 5, 1893.

For value received, we, or either of us, promise to pay to *E. Cooper*, or order, *seven hundred* dollars on the first day of *October, 1894*, and *seven hundred* dollars on the first day of *October, 1895*, and *six hundred* dollars on the first day of *October, 1896*, at *New Rockford, N. D.*, Bank of *New Rockford*, with interest at *eight* per cent. per annum from date until paid, payable annually.

The words and figures in italics were filled in by Whitehead. The stock company was not formed, and no horse was purchased by the defendants. Whitehead, however, after detaching the lower page, and filling out the blanks, sent the pretended note to E. Cooper, his principal. On or about June 1, 1893, Cooper indorsed the note in suit to plaintiff as collateral security to a debt which he then owed it, and received back from plaintiff other collateral security. The amount of Cooper's indebtedness to the plaintiff was then and is now in excess of the amount of the note here in suit.

It further appears from the findings that no part of the note in suit has been paid; that plaintiff parted with value for said note in the due and regular course of business, before maturity, and in good faith, without notice of any defects in the execution of said paper, or of the fact that a portion of it had been filled out after it had been executed by the defendants to said E. Cooper, or that any paper or writing had been attached to said paper, or was in the same book with it, or of any other matter or thing which would provoke inquiry as to the defense now set up by the defendants.

The question of the defendants' negligence in signing the document, which was afterwards converted into the note in suit,—and that is the only question relied upon by appellant,—is to be determined upon the facts hereinbefore set out. The trial court found, both as a matter of fact and as a conclusion of law, that the defendants were not guilty of negligence. It appears from

the facts already stated that the note in suit is without consideration, and that it has been materially altered, and is not the instrument originally signed by the defendants. It goes without saying that, as between the original parties, a recovery could not be had. The defense now interposed would necessarily be sustained. What is the position of the plaintiff, who concededly is a purchaser of the note in due course? Can the plaintiff, merely because it is a good faith purchaser of the note in suit, recover on the same, notwithstanding the fact of the alteration of the instrument? There can be no doubt that under the general rule relating to the alteration of instruments a negative answer would be required to this question. The alteration in this case was material, and made by the agent of the payee, and without the consent of the defendants. It is well settled that, even as against an innocent indorsee, a negotiable instrument so altered is rendered void. The rule which is sustained by both reason and authority is well stated by Judge Dillon in his article on "Alteration of Instruments" in 2 Enc. Law & Proc., at page 177, as follows: "Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke—which changes the legal identity or character of the instrument, either in its terms or the relation of the parties to it—is a material change, or technical alteration, and such a change will invalidate the instrument against all parties not consenting to the change. Not only will an alteration vitiate the instrument as between the immediate parties, but also as against a *bona fide* holder or indorsee without notice; and the latter can acquire no right or title other than that of the person under whom he claims." See cases cited by state under note 82; also, 2 Am. & Eng. Enc. Law (2d Ed.) p. 193, and cases cited; also, the opinion of this court in *Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473, and § 3937, Rev. Codes, 1899, which is declaratory of the rule as above stated. As was said in *Bank v. Laughlin*, *supra*, "After such alteration, the paper is no longer the same paper as that sent out by those who executed and delivered the original instrument." Counsel for plaintiff frankly admits that under the rule as above stated the plaintiff cannot recover in this action. Their sole contention is that upon the facts of this case the defendants are estopped from denying the execution of the note in the form in which it was purchased by the plaintiff. It is claimed that the defendants were guilty of gross negligence, both in fact and in law, in signing the instrument which was afterwards converted into the note sued upon. While it is a well-settled rule that a material and

unauthorized alteration of a negotiable note renders it void even as against an indorsee in due course, it is equally well-settled that there are exceptions to this rule, under which the maker may be prevented from relying upon the alteration for the purpose of defeating a recovery. The most familiar exception as applied to negotiable notes, covers all of these cases where parties have either signed skeleton notes, or notes only partially filled out, and the same have thereafter been filled out, and transferred to an innocent holder. The cases are exceedingly numerous where notes so altered have been enforced at the suit of innocent indorsees notwithstanding the fact that they were materially different from the instrument signed by the maker. The doctrine upon which a majority of these cases rests is that the maker of the note, by signing it while it contains blanks, and knowing that it may be given currency as commercial paper, impliedly, assents that the blanks may be filled out; that is, the law implies his consent to the alteration from the fact of his signing it with blanks therein. In that view the person filling the blanks is held to be the agent of the maker. The alteration, in this view, is made with the consent of the maker of the note, and the contract therefore is his contract. Other cases place the liability of the makers upon the ground of estoppel by negligence. The limitations upon this implied power to fill blanks is well stated by Judge Dillon in the article before referred to, on pages 159 and 161, as follows: "It may be laid down generally that if one signs an instrument containing blanks he must be understood to intrust it to the person to whom it is so delivered to be filled up properly, according to the agreement between the parties; and when so filled the instrument is as good as if originally executed in complete form; and, if one signs or indorses a bill containing blanks to be filled, the delivery of such an instrument is an authority to fill up the blanks in conformity with the original instrument. * * * The implied authority to fill blanks is confined to such insertions as are necessary to make the instrument perfect according to its nature, frame, and intended use. There is no inference of authority to make any additions to the terms of the instrument, or to make a new instrument by erasing what is written or printed, or by filling blanks with stipulations repugnant to the plainly expressed intention of the paper as shown by its written or printed terms; and such an addition or alteration will avoid the instrument, even in the hands of an innocent holder, unless the person authorized to fill the blanks may be considered as a stranger with reference to any other changes which he may make." See cases cited under notes 74, 75, 82, and 83.

We may now inquire whether, upon the facts in this case, the defendants are liable upon the note in suit under the doctrine of implied authority or estoppel by negligence. We are agreed that they are not liable. It certainly cannot be claimed that the plaintiff has any right of recovery upon the note sued upon which depends upon the doctrine of implied authority. The instrument sued upon is a negotiable promissory note. The instrument signed by the defendants was not a negotiable note in form, with unfilled blanks, but on the contrary, was a stock contract, in which the signers agreed to associate themselves together to buy a horse. Applying the doctrine of implied authority to the instrument signed by the defendants, it is apparent that it would extend only to filling the blanks in the instrument according to the purport and effect of the contract as contained within its four corners. Had all of the blanks been filled, it would still be a contract, non-negotiable and conditional, and the promises to pay therein contained would be unenforceable save upon the condition of an actual association being formed and an actual purchase of a stallion. The instrument was not so filled out, but, on the contrary, the contract was cut in two, and an entirely different instrument was created. As we have seen, the doctrine of implied authority does not extend to the creation of different instruments. We find no basis of fact in this case to conclude that there was any implied authority in Cooper or his agent to convert the contract signed by the defendants into the note here sued upon. Neither are we able to find that the defendants were negligent in signing the contract as they did. The cases are numerous where parties who have unwittingly signed negotiable notes have been held liable to good-faith purchasers because of their negligence and carelessness in not ascertaining the nature of the instrument signed by them. That, however, is not this case. In this case the parties signed the instrument knowingly. But they did not sign a skeleton note, or a note containing blanks, but an entirely different instrument. They were able to read the contract and they read it before signing it, and understood its general nature. We are not able to see wherein they were negligent in signing it. The most that can be said is that they were negligent in not having the blanks filled out; but, as we have seen, they were not bound to assume that the instrument would or could be filled out in any other way than according to its general terms and purport. We do not think the contract signed by the defendants presented such an appearance as to make the mere fact of their signing the paper an act of carelessness. The loss resulting from the forgery must

fall upon the purchaser of the forged paper, and not upon the innocent makers of the stock contract. The defendants had as good a right to rest upon the presumption that the contract which they signed would not be converted by forgery into a negotiable promissory note as the plaintiff had to presume that the note which he purchased was not forged. Parties taking such paper must be considered as taking it at their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it and of the intermediate holders. *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Bank v. Clark*, (Iowa) 1 N. W. Rep. 491, 33 Am. Rep. 129; *Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Gerrish v. Glines*, 56 N. H. 9; *Kellogg v. Steiner*, 29 Wis. 626; *Scofield v. Ford*, 56 Ia. 370, 9 N. W. Rep. 309; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Searles v. Seipp*, 6 S. D. 472, 61 N. W. Rep. 804. It follows from what we have said that the trial court correctly held that the plaintiff is not entitled to recover in this action.

The judgment of the district court is affirmed.

All concur.

HOLDER IN DUE COURSE TAKES FREE FROM EQUITIES. § 59.

Wirt v. Stubblefield (1900), 17 App. Cas. D. C. 283.

Hearing on an appeal by the defendant from a judgment of the Supreme Court of the District of Columbia under the Seventy-third rule of that court for want of a sufficient affidavit of defense in an action on a promissory note. Affirmed.

The facts are sufficiently stated in the opinion.

Mr. F. H. Stephens, for the appellant.

Mr. Howard Boyd, for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This is an appeal from the Supreme Court of the District of Columbia, and the question involved arises under the Seventy-third rule of that court. The action was brought by the appellee, Thomas W. Stubblefield, as indorsee of a promissory note, dated August 12, 1899, for \$375, payable three months after date, made by the present appellant, John L. Wirt, payable to C. T. Havenner or order, and by the latter indorsed to the appellee the plaintiff in the action. The action was brought jointly against both the maker and the indorser of the note, as authorized by the statute. Judgment was rendered against the indorser, but the maker,

the appellant, resisted judgment under the rule of court, upon the defense interposed by him, by plea and affidavit, "that the said note sued on was given in payment of money alleged to be due on a certain wager or gaming transaction, to wit, a wager upon the fluctuations in the price of certain stock wherein the said defendant lost, and the said note was given to meet the payment of the said loss." The affidavit of the defendant was filed to support this plea; but the court below ruled the affidavit to be insufficient, under the Seventy-third rule of the court, and thereupon entered judgment against the defendant under the rule, for want of sufficient affidavit of a valid defense; and the defendant has appealed.

This defense of gaming consideration for the note, set up by plea and affidavit, is made upon the assumption that the old British statutes against gaming, of 16 Car. 2, Ch. 7, and 9 Anne, Ch. 14, were in force in the state of Maryland at the time of the cession by that State of the District of Columbia to the United States, or at the time of the passing of the act of Congress of February 27, 1801, declaring what laws should be in force in this District, and that they formed a part of the statute law of the State that was adopted and declared of force in this District by the act of Congress. That those British statutes against gaming were in force in the State of Maryland in 1801, there can be no question or doubt (*Alex. Brit. Stats.* 476, 689); and that they were adopted and became a part of the law of this District, is equally free of doubt. *Fleming v. Foy*, 4 Cranch. Cir. Ct. Rep. 426. And those statutes are still in force here, except as they may have been repealed by force of the act of Congress of January 12, 1899, known as the "Negotiable Instrument Law," so far as they relate to or may affect negotiable instruments, such as bills and notes.

Gaming consideration is not mentioned, nor is that of usury, in the recent act of Congress of January 12, 1899; nor are any of the statutes upon the subject of gambling or usury referred to, and therefore, if the old British statutes to which we have referred have been partially repealed by the act of Congress, it is by implication and not by express terms. The act of Congress does provide, however, by section 190, "That all laws of force within the District of Columbia, inconsistent with the foregoing provisions of this act, be, and the same hereby are, repealed." It must, therefore, have been supposed, and within the contemplation of Congress, that there were laws or legislation in force proper to be repealed; and the question is, what laws were thus intended to be repealed?

To determine, then, the question, whether there is conflict or inconsistency between the provisions of the act of Congress and the effect and operation of the British statutes of 16 Car. 2, Ch. 7, and 9 Anne, Ch. 14, we must consider not only the express provisions of the act of Congress, but the policy and object of its enactment, as compared with the effect and operation of the statutes against gaming. We know the origin and history of the act of Congress. We know it is largely derived, in its form and provisions, from the English act upon the subject; and we know, moreover, that the great and leading object of the act, not only with Congress, but with the large number of the principal commercial States of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute was, to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it, to the prejudice and disappointment of innocent holders, as against all of the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute, as against the original maker or acceptor; as is the case by the operation, indeed, by the express provision, of the statutes of Charles and Anne. For although the statutes declare that all bills and notes made upon gaming considerations shall be void to all intents and purposes, yet it has never been allowed as a valid objection to an action against the drawer or indorser that the bill or note was accepted or made on a gaming consideration. This construction of the statutes has proceeded upon the ground that it was necessary to further the object of the statute; for to exempt the drawer or an indorser from suit might assist a winner, whom the statutes meant to punish, not to protect. *Edwards v. Dick*, 4 B. & Ald. 212. But as against the maker of a note or the acceptor of a bill, the instrument was absolutely null and void, even in the hands of an innocent holder for value, taking the paper in due course before maturity. This was certainly an evil that required correction; and the necessity for the correction is founded upon a just commercial policy of sustaining the credit and circulation of negotiable instruments, and falls clearly within

the object and policy of the act of Congress of January 12, 1899. The old English statutes, to which we have referred, have been repealed in England, by Stat. 8 and 9 Vict., Ch. 109, and other provisions substituted for them; and we are not aware that the provisions of those old statutes, so far as they were made to affect negotiable instruments, constitute the existing law in any State of the Union; though such statutes may have been, and doubtless were, extensively adopted in the last and the early part of the present century.

By the "Negotiable Instrument Act" of January 12, 1899, in its 55th section, it is provided "that the title of a person who negotiates an instrument is *defective* within the meaning of this act, when he obtained the instrument or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

And by section 60 it is provided "that the maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

Consideration is illegal either at the common law, or by statute. When the title to a bill or note is defective by reason of an illegal consideration at the common law, the instrument is good in the hands of an innocent indorsee for value against all parties. But not so where the consideration is made illegal by statute, and the instrument itself is declared to be null and void, as in cases of bills or notes made upon gambling or usurious transactions. *Cromwell v. Sac County*, 96 U. S. 60.

This subject, with the distinction just stated, is expounded with great force and clearness by Judge Story, in his work on Promissory Notes, in sections 191 and 192. He says, "that a *bona fide* holder for value, without notice, is entitled to recover upon any negotiable instrument, which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft, or by robbery. And the same doctrine will generally apply to all cases of a *bona fide* holder for value, without notice before it becomes due, where the original note, or the indorsement thereof, is founded on an illegal consideration; and this upon the same general ground of public policy, without any distinction between a case of illegality, founded in moral crime or turpitude, which is *malum in se*, and a case founded in the positive prohibition of a

statute, which is *malum prohibitum*; for, in each case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is, where the statute, creating the prohibition, has, at the same time, either expressly, or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice, or not. There are few cases, in which any statute has created a positive nullity of such instruments, either in England or America. The most important seems to be the statutes against gaming, and the statutes against usury. And the policy of these enactments has been brought into so much doubt in our day, that in England the rule, as to usury and gaming, and some other cases, has been changed by recent statutes; and a total repeal, or partial relaxation of it, has found its way into the legislation of America."

It is difficult to conceive, if we bear in mind the object and policy intended to be promoted by, as well as the entire scope and express provisions of, the "Negotiable Instrument Law," that the framers of that act ever intended to save and preserve unrepealed, as part of the law governing negotiable instruments, the old English statutes of 16 Car. 2, and 9 Anne, against gaming. On the contrary, it was most clearly among the objects and purposes of that act, to get rid of all such impediments and hindrances to the circulation of negotiable instruments as had been created by those old statutes, and to embody the entire law upon the subject, as far as practicable, into one well digested and consistent act. It is true, as a general rule, that where there are two acts on the same subject, the rule is to give effect to both, if it can consistently be done. "But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of a repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." *Davies v. Fairbairn*, 3 How. 636; *United States v. Tynen*, 11 Wall. 88, 92. It is quite clear that the act of Congress was intended to cover the whole subject of negotiable instruments as far as it could be done by statute; and therefore to exclude the operation and effect of former statutes like those of Charles and Anne. But there is manifest inconsistency or repugnancy, as we have shown, between the effect and operation of those old English statutes, so far as they affect negotiable instruments, and the provisions and policy of the "Negotiable Instrument Law" of

Congress; and this construction of the latter act is strongly fortified by the general provision of that act which declares that "In any case not provided for in this act the rules of the law merchant shall govern." We know that no such prohibition or nullity as that declared in the old statutes against gaming has any recognition in the law merchant. The law merchant is a system of commercial law founded upon the most liberal and enlarged customs and usages, for the promotion of trade, and which is applied to for the decision of the causes of merchants, by such general rules as obtain in all commercial countries, and is, therefore, wholly inconsistent with the gaming statutes; and it applies often even in matters relating to domestic trade, as, for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange. 1 Black. Com. 173. And since the statute 3 and 4 Anne, Ch. 9, promissory notes, when indorsed, are placed upon the same footing of inland bills of exchange, if they were not so before that statute.

We are clearly of opinion that the British statutes of 16 Car. 2, Ch. 8, and 9 Anne, Ch. 14, against gaming, so far as they might or would, if in force, affect the validity of the negotiable instruments embraced by the act of Congress, are inconsistent with the provisions of the latter act, and they are, therefore, to the extent that they are so inconsistent or repugnant to the act of Congress, repealed, and no longer, as to negotiable instruments, in force in this District.

The affidavit of the defendant, filed under the Seventy-third rule of the court, showing no sufficient defense to the action, there was no error in entering the judgment for the plaintiff under that rule; and the judgment appealed from must be affirmed; and it is so ordered.

Judgment affirmed.

HOLDER DERIVING TITLE THROUGH HOLDER IN DUE COURSE TAKES
FREE FROM EQUITIES. § 60.

Simon v. Merritt (1871), 33 Iowa, 537.

Appeal from Lee District Court.

Action by the holder of a promissory note against the maker. There was a verdict and judgment for defendant. Plaintiff appeals.

Jno. Van Valkenburg, Slagle & Acheson, for the appellant.
F. Semple, for the appellee.

BECK, Ch. J.—The defendant filed an equitable answer setting up fraud practiced by the payee of the note upon defendant in order to procure its execution, and alleging a conspiracy on the part of the transferee of the note, the payee and others to cheat and defraud citizens generally, and that defendant, by the fraud practiced upon him, was induced to sign the note. The answer avers that plaintiff had notice of the fraud in procuring the note, and that it was given without consideration. It is also alleged that plaintiff's transferrer had notice of the fraud. The answer is in the nature of a cross-bill, and the payee, Hunter, a former transferee, Leggett, with others, are made defendants. These parties, or at least plaintiff, Simon, and his immediate transferrer, Leggett, answered the cross-bill, denying the matters therein alleged. Upon the issues thus formed, no objection having been made to the manner of their presentation and trial, the cause was submitted to a jury, and evidence in support and denial of the allegations of the pleadings was introduced. Among other instructions the court gave the jury the following: "If you find from the evidence that the note in question was obtained of the makers by fraud and deception, and if you further find that the plaintiff, Simon, knew of such fraud and deception, or if he had reason to know or believe that said note was fraudulently obtained of the maker, and that it is void, and if, because of such knowledge or belief, he refused to receive or purchase it of Leggett until an indemnifying bond was executed to him by Leggett, then the law of the case is with the defendant, and if you so find then your verdict should be for defendant." And the instruction directed the jury that if plaintiff, "in good faith, for a valuable consideration, obtained the note in the ordinary course of business, before maturity, without notice of fraud, or without having reason to know or believe that the note was obtained by fraud of the maker," they should find for plaintiff.

These instructions are erroneous. They leave out of view the well-settled doctrine that if Leggett, the transferrer of plaintiff, was such an innocent and *bona fide* holder of the paper, that in his hands it could have been enforced against defendant, plaintiff, although he may have taken the note charged, with notice of its infirmities, may recover in this action. If Leggett so held the note, his title and rights thereto were such that they could not have been defeated by defendant. In the transfer, the title and rights held by him passed to plaintiff. The notice which plaintiff may have had of the fraud in the original transaction does not defeat the rights he acquired by the transfer.

One reason of the rule is obvious. The maker of the note

would be liable to the transferrer; his condition is made no harder by the note coming into the hands of one having notice of its infirmities. We do not understand that there is any conflict in the authorities upon this point. *Hoskell & Gurvey v. Whitmore*, 19 Me. 102; *Smith v. Hiscock*, 14 id. 449; *Prentice & Messenger v. Zane*, 2 Gratt. 262; *Boyd v. McCann*, 10 Md. 118; *Howell v. Crane*, 12 La. An. 126. See authorities cited in Story on Prom. Notes, § 191.

The instructions above set out, being in conflict with this doctrine, ought not to have been given. For this reason the judgment of the district court is
Reversed.

Jennings v. Carlucci et al. (1904), 87 N. Y. Supp. 475.

Appeal from City Court of New York, Trial Term.

Action by Clarkson Jennings against Frederick Carlucci and another. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Affirmed.

Argued before FREEDMAN, P. J., and SCOTT and BLANCHARD, JJ.

Menken Bros., for appellants.

Otto Droege, for respondent.

BLANCHARD, J. This action was brought to recover the amount due on a promissory note made by the defendant Gagliano to one Bell, and indorsed by the defendant Carlucci and as so indorsed delivered to said Bell. The note was thereafter indorsed by Bell, without recourse, to A. Lambertti, who indorsed it to P. J. Lambertti, who indorsed it to Di Lorenzo. The evidence established the facts that Di Lorenzo was a *bona fide* holder of the said note; that he acquired it in due course, and for value, before maturity; that he transferred it for value, after maturity, to the plaintiff. The defendants, by their answers, interposed certain defenses which might have been available as between the original parties to the note. But Di Lorenzo, being a *bona fide* holder of the said note in due course, and for value, took the note without any infirmity attaching thereto, and his title to it appears to have been perfect. The same title passed to the plaintiff upon the transfer of the note to him by Di Lorenzo for value. Neg. Inst. Law, § 97 (Laws 1897, p. 732, c. 612); *Weems v. Shaughnessy*, 70 Hun, 175, 24 N. Y. Supp. 271. The exceptions of the defendants are without merit.

The judgment and order appealed from should be affirmed, with costs.
All concur.

PAYEE DERIVING TITLE THROUGH HOLDER IN DUE COURSE DOES NOT
TAKE FREE FROM EQUITIES. § 60.

Kost v. Bender (1872), 25 Mich. 515.

Error to Lenawee Circuit.

A. L. Millard, for plaintiff in error.

Howell & Watts, and *C. A. Stacy*, for defendant in error.

COOLEY, J.—The declaration in this case is upon a promissory note which was given to the plaintiff by the defendant as part payment on a purchase of lands supposed to be valuable for the production of mineral oil. The defense is, that the defendant was defrauded in the sale, and has sustained damages in consequence, which he is entitled recoup.

The note is negotiable, and was transferred by the plaintiff, before it fell due, to a party, who, he claims, was a *bona fide* purchaser, without notice of any infirmity, and who afterwards, for a new consideration, sold it back to him. And the plaintiff further claims, that the note, having once passed to a *bona fide* holder in whose hands it was subject to no defense, of fraud in inception, or defect in consideration, is forever thereafter discharged of such defense, into whose hands soever it may afterwards come.

It is perfectly true as a general rule, that the *bona fide* holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchanges of commerce. For, if one can stop the negotiability of paper against which there is no defense, by giving notice that a defense once existed while it was held by another, it is obvious that an important element in its value is at once taken away.

But I am not aware that this rule has ever been applied to a purchase by the original payee, nor can I perceive that it is essential to the protection of the innocent indorsee, that it should be. It cannot be very important to him, that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected by the circumstance, that a single individual

cannot compete for its purchase, especially when we consider that the nature of negotiable securities is such that their market value is very little influenced by competition. Nor do I perceive that any rule of principle of law would be violated by permitting the maker to set up this defense against the payee, when he becomes indorsee, with the same effect as he might have done before it had been sold at all, or that there is any valid reason against it.

The ground of defense is, the claim for damages which the maker has, by reason of the fraud alleged to have been practiced upon him. It is not pretended that this claim is extinguished by the sale of the note, but only that it is thereby separated from the note and incapable of again becoming annexed to it. After the payee had sold the note, he might have been sued upon this claim, and when he again becomes the holder, he is indisputably liable in some form. The question, then, seems to be, whether the maker shall be compelled to submit to judgment on his note, and then resort to a separate action for damages, or whether all disputes growing out of the one transaction shall be submitted to one jury.

In general, the policy of the law is to avoid circuitry of action, wherever it can be done without confusion; and cases of a counter claim like this, are always held to be proper cases for the application of this rule of policy. And if we do not apply it in this case, it must be because of a purely technical reason, and not because the interests of justice would be prejudiced.

The technical reason is, that by the sale of the note to a *bona fide* holder the claim for damages has been severed from it, and the payee when he again becomes holder, will sue upon it in his character of indorsee, and cannot have his demand reduced by a claim which could only be offset because of its being an incident to the debt, and which ceased to be an incident when the first transfer took place. But there are many cases in which the law, to avoid circuitry of action, disregards such intermediate transactions, and remits the parties to their original rights and equities, with a view to the most speedy and effectual remedy. When this defense was severed from the note by the first transfer, it was done by means of the plaintiff's own wrong. If the defendant had a legal and just defense to the note, either in whole or in part, arising from the conduct of the plaintiff, it was the duty of the latter to recognize and allow it, and he had no moral right to cut it off, or attempt so to do, by any transfer. But, having done so, and afterwards acquired the note a second time, the law, we think, will not permit him to take advantage of this wrong, but will

remit the defendant to his original rights. Such, we think, should be the rule; because it avoids circuity of action, expense to the parties, and inconvenience to the courts, without, at the same time, endangering any substantial rights. We had occasion to recognize an application of the same principle, in *Dubois v. Campau*, 24 Mich., 360, in which a party, whose duty it had been to pay certain taxes, sought afterwards to claim the benefit of a tax-title which was based upon his default to pay them, and which a third party had bought in, and then sold to him. It was held in that case that he had no more right to claim the benefit of the title he had thus bought in, than he would have had if he were the original purchaser at the tax sale; and we think the same rule is applicable here, and rests upon reasons equally strong.

For the errors pointed out:

The judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

HOLDER PRESUMED TO BE HOLDER IN DUE COURSE. § 61.

Paton v. Coit et al. (1858), 5 Mich. 505.

Error to Wayne Circuit.

The action was *assumpsit* by defendants in error against plaintiff in error, upon the acceptance by the latter of a draft drawn upon him by Hildebrand & Co., of Cleveland, Ohio, dated March 30th, 1857, payable to the order of C. & A. Ives, and by them indorsed.

The defendant pleaded the general issue.

On the trial the acceptance having been given in evidence, the plaintiff rested.

The defendant then introduced a witness, and being required to state what he expected to prove by such witness, stated that he expected to prove that such acceptance was given in payment and as security for ten barrels of intoxicating liquor, called whisky, purchased by defendant on the 30th day of March, 1857, in Detroit, of the drawers of said draft.

The plaintiffs objected to such evidence, upon the ground that under the exceptions in section two of the prohibitory liquor law of 1855, the presumption was that said draft was in the hands of *bona fide* holders, to wit, the plaintiffs; and that the *onus* was on the defendant to show, or propose to show, notice before said

testimony could be received. The court sustained the objection, and refused to allow the testimony to be given; and defendant excepted.

Judgment having been rendered for plaintiffs below, for the amount of the acceptance, the defendant brought the case to this court by writ of error.

Howard, Bishop & Holbrook, for plaintiff in error.

Walkers & Russell, for defendants in error.

CHRISTIANCY, J.—Whether the evidence in this case was properly rejected, does not depend upon the question, Whether, standing alone, it would have constituted a complete defense against the draft in the hands of a *bona fide* holder for value; but, Whether it would have been sufficient to throw upon the plaintiff the burden of proving himself to be such *bona fide* holder; or, Whether, in fact, the evidence tended, *prima facie*, to establish a defense.

It is assumed by the counsel for the defendants in error (plaintiffs below), that the only effect of the statute in reference to negotiable paper given for liquors sold, “is to render such paper without consideration as between the immediate parties,” and that “the effect of the exception in section two is simply to put this statute *equity* on a footing with all other equities” between the original parties to negotiable paper.

If this be the only effect of the statute, then, according to the prevailing current of recent decisions, the evidence was properly rejected, though the cases upon this point are by no means uniform; and we do not wish to be understood as giving any opinion upon the question presented by this hypothesis, as we do not think it involved in the present case.

The defense here proposed was not merely the *want*, but the *illegality* of consideration; and this, being allowed as a defense between the original parties, irrespective of, and even contrary to the equities of the parties, can not, without perversion of language, be called an equity. It is not on the defendants’ account that such a defense is allowed, as will more fully appear in the sequel.

The effect of the statute in question is not merely to render such paper with consideration, but absolutely *void and illegal*, between the immediate parties, and all others who have not obtained it for value, and without notice—not only void in the negative sense of having no legal basis, but affirmatively illegal as violating the positive provisions of the statute. It was not even

contended that the facts offered to be shown by the defendant would not have made a *prima facie* case of an illegal sale, without showing that the sale did not come within any of the exceptions of the statute; and if the plaintiffs claimed to maintain the validity of the sale under any such exception, the burden of proof (this being a civil case) rested upon them to bring it within the exception.

Now, upon principle, as a question of statute construction, and without reference to any authority, when the statute expressly declares all such paper void and illegal, and forbids any action to be brought or maintained upon it "except when brought by a *bona fide* holder who has received the same upon a valuable and fair consideration without notice or knowledge," etc., it would seem to follow as a logical necessity, that when the paper is shown to have been given for such illegal consideration, the plaintiff's right of recovery is cut off by the general prohibition of the statute, unless, in avoidance of this, he gives evidence of those facts which alone can bring him within the exception.

We do not propose to give a definite opinion upon the point, whether, the illegality being first shown, the burden of proof in this case would have rested upon the plaintiffs to show actual want of notice; this might be requiring actual proof of a negative. But we are inclined to the opinion that they should have shown the nature of the transaction accompanying the transfer; and if that disclosed no suspicion of such notice, it might make a *prima facie* case of want of notice, and throw upon the defendant the burden of proving notice. But the *amount* of the *consideration* given by the plaintiff is distinct from the question of notice, and the absence of such consideration, in such a case, would be a defense, though the paper had been taken by the plaintiff *without notice*. The amount of consideration given by the plaintiff is an affirmative fact peculiarly within his own knowledge, and not generally in that of the defendant, and being necessary to bring the plaintiff's case within the exception of the statute, should be proved by him. To allow him to recover without such proof, would be an evasion of the statute. Such proof (the illegality being first shown) is a necessary part of the plaintiff's case, without which he shows no *prima facie* right to recover; and though, in ordinary cases, this fact would be presumed in favor of the holder, this presumption can never be allowed without proof, when the paper was absolutely void between the original parties, on the ground of fraud, illegality, or duress.

This construction of the statute is sustained by authority. In

England, by the statute of Anne, a note or bill given or indorsed upon a usurious consideration, was void, even in the hands of a *bona fide* holder for value (Chit. on Bills, 9 Am. Ed., 110); but the statute, 58 Geo. III., Chap. 93, made such note valid in the hands of a *bona fide* holder for value without notice. In the case of *Wyat v. Campbell*, 1 M. & M., 80, where the note had been indorsed by a previous indorser upon a usurious consideration, and no notice given to plaintiff to prove consideration, it was contended that the plaintiff was not bound to prove it. But, by Lord Tenterden, Ch J.—“the statute, 58 Geo. III., Chap. 93, makes a note tainted with usury valid in the hands of a *bona fide* holder; the *onus* is therefore upon the holder to prove he is such; otherwise the statute does not apply, and the note is void under the statute of Anne.”

In that case, it is true, the exception was in a subsequent statute; here it is in the same statute; but we are unable to perceive how this can make any difference as to the burden of proof. If the fact was not to be presumed in that case, it can not be in this.

But whether this conclusion be right or wrong, as depending purely upon a question of statute construction, can make little difference in this case. The rule as to the burden of proof is the same upon principle and authority to common law. Whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it *bona fide*, and gave value for it: *Northam v. Latouche*, 4 C. & P., 140; *Bailey v. Bidwell*, 13 M. & W., 73; *Harvey v. Towers*, 6 Exch., 656; *Smith v. Brain*, 20 Q. B., 201; *Fitch v. Jones*, 32 Eng. L. & Eq., 134; *Vallett v. Parker*, 6 Wend., 615; Edw. on Bills, 686, 687; Chit. on Bills, 11th Am. Ed., 661, 662; Story on Bills, § 193.

The case of *Bailey v. Bidwell* is directly in point; and Parke B. gives a very satisfactory reason why the fact in question is not to be presumed by the plaintiff. “If,” he says, “the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it.” The subsequent case of *Fitch v. Jones*, above cited, shows that in such case the original payee is still presumed to be the owner, and that the plaintiff sues for his benefit; and it is to overcome this presumption that the plaintiff is required to prove himself a *bona fide* holder for value.

The rule is the same as to the burden of proof, where it is shown that the paper was obtained by fraud or duress, and when stolen, or put in circulation by fraud. See authorities above cited, and *Millis v. Barber*, 1 M. & W., 425; *Holme v. Karsper*, 5 Binn., 469; *Aldrich v. Warren*, 16 Maine, 465; *N. Y. & Va. State Stock Bank v. Gibson*, 5 Duer, 574. In fact, many of the cases, and most of the elementary works, place illegality in the same category with fraud or duress, as casting the burden of proof upon the holder.

But while the result is the same, it is manifest that the basis of the rule in the case of illegality, though equally solid, is quite different. In the case of duress and fraud, as well as where the paper has been stolen, the *equities* of the defendant constitute the *basis* of the rule. But in the case of illegality of consideration, both parties are generally equally in fault; and it is not to protect the equities of the defendant, but on broad grounds of public policy—to uphold the law, and to discourage its violation or evasion—that the burden of proof is cast upon the plaintiff. It is as much the duty of courts to discourage the violation or evasion of law as to protect the equities of parties. And it is upon this principle only that the naked defense of illegality is allowed. See opinion of Lord Mansfield in *Holman v. Johnson*, Cowp., 343. And upon this principle, courts should be careful to avoid doing anything to facilitate the enforcement of such contracts, unless it appear affirmatively that the plaintiff is not in fault, and that he has real equities to be protected.

The evidence was improperly rejected.

The judgment must be reversed, and a new trial granted.

All the Justices concurred.

TITLE IV.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

DISCHARGE OF PARTY PRIMARILY LIABLE.

§ 121.

Page Woven Wire Fence Co. v. Poole (1901), 129 Mich 57.

Error to Montcalm: DAVIS, J.

Assumpsit by the Page Woven Wire Fence Company against Phoebe M. Pool on a promissory note. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Plaintiff brought an action of *assumpsit*. The declaration was upon the common counts, with notice attached that plaintiff would "give in evidence a certain promissory note, copy of which is given below." The note and indorsement read as follows:

"\$200.

"GRAND RAPIDS, STATE OF MICHIGAN, Sept. 28, 1899.

"Ninety days after date, I, of Lakeview postoffice, residing in the town of Cato, county of Montcalm, State of Michigan, for value received, promise to pay to the order of the Page Woven Wire Fence Co., or bearer, without default, two hundred dollars, payable at Lakeview Bank, with exchange and collection charges. Interest at seven per cent. per annum until paid.

"Residence 4½ miles S. E. Lakeview of postoffice.

"PHŒBE M. POOL."

Indorsed as follows:

"E. E. Metcalf.

[Two two-cent revenue stamps canceled.]

"Pay to the order of any bank for collection and remittance to Page Woven Wire Fence Co., Adrian, Mich."

Under plea of the general issue, defendant gave notice that she would give in evidence—

"That from and after the 27th day of December, A. D. 1899, said plaintiff did not hold any promissory note signed and executed by defendant, and that on the 1st day of January, A. D. 1900, said plaintiff did not hold any such note, and that said plaintiff did not at the date of the commencement of this action,

and does not at this date, hold any promissory note signed and executed by this defendant, and that defendant does not owe said plaintiff, on any note or otherwise, any sum of money whatever; that defendant has no knowledge of the promissory note copy of which is given in plaintiff's declaration, but defendant admits the execution of a promissory note identical in form to the copy set forth in said declaration, which said promissory note so given by defendant as aforesaid has been fully paid, and is now, and since the 27th day of December, A. D. 1899, at which time this defendant paid the same in full, has been, in defendant's possession, as receipt and evidence of the payment thereof; and that, if plaintiff now holds any note against defendant, it is only a copy or forgery, as the note paid by defendant, and now in her possession, is the identical note executed to plaintiff, and the only note executed and delivered by defendant to plaintiff."

To this was attached her affidavit setting forth the same facts.

In opening the case to the jury, counsel for plaintiff stated that, before the note became due, plaintiff forwarded it to a bank at Lakeview for collection, as its agent supposed; that in that letter the name of defendant was given as Philo M. Pool; that on the same day it wrote a letter to Philo M. Pool, stating that the note was sent to the bank for collection; that afterwards, discovering its mistake in the name, it wrote to the bank and defendant, correcting the mistake, and informing her that her note was in the bank for collection; that she called at the bank to see about the matter; that when it became due she did not call at the bank, and has never paid it; that the first time plaintiff's agent or attorneys saw the note afterwards it was in defendant's hands; that she has it now; that plaintiff never authorized any one to collect the note except the bank; and that plaintiff did not know how it came into her possession. Plaintiff had given defendant notice to produce the note. After the opening to the jury, plaintiff's counsel asked defendant's counsel to produce it. Her counsel admitted that they had the note in court, but declined to produce it except upon the order of the court. The reason given by counsel was that plaintiff had given notice that it would give in evidence the note declared upon, that it had no such note in its possession, and that it had not sued upon a lost note or given indemnification. The court sustained defendant's contention, and directed a verdict for her.

Robertson & Clark and L. C. Palmer, for appellant.

V. H. & H. H. Smith, for appellee.

GRANT, J. (after stating the facts). The court said there were two theories upon which plaintiff might have proceeded: (1) That the note was lost; and (2) that, if it was not lost, the declaration ought to apprise defendant of the plaintiff's claim of the manner in which the note came into her hands. Before bringing suit plaintiff knew that defendant had the note in her possession. The payor of a promissory note cannot be subjected to a suit, and compelled to accept a bond of indemnity under the statute, when the payee knows where the note is, and has it in his power to produce it in court. It is not necessary to determine whether the note is negotiable or non-negotiable. The suit is between the payee and the payor. No third person is interested. The note, which is only evidence of the debt, was in the possession of the payor, the defendant. The declaration does not allege that plaintiff is in possession of the note, but only that it will give it in evidence upon the trial. Plaintiff took the proper and legal steps to do so, and they resulted in the production of the note in court. The sole question for determination was, Had it been paid? Undoubtedly the possession of the note by the payor made a *prima facie* case of payment, and threw the burden upon the plaintiff to prove non-payment. If defendant had not paid it to an authorized agent of plaintiff, the question would be, Was it paid by defendant to some one under such circumstances that the law protects her in doing so? The court below based its decision on *McKinney v. Hamilton's Estate*, 53 Mich. 497 (19 N. W. 263). That case does not apply. The note there was in the possession of a third person claiming title to it, and having the usual marks of ownership. The holder of the note was not made a party litigant, and the estate might have been subjected to two suits, and to two judgments against it. It was held that the claimant must be prepared to produce the note in court upon the trial, so as to be properly marked and impounded. In the present case the note is in court, and under its control. All the parties interested are in court, and are parties to the suit. Plaintiff asserts ownership, non-payment, and that the note did not come lawfully into the possession of the defendant. The declaration asserts ownership and non-payment. The defendant in her plea asserts payment. The issue is clearly drawn by the pleadings, and both parties understood it. The ruling of the court was erroneous.

Reversed and a new trial ordered.

The other Justices concurred.

Lancey v. Clark (1876), 64 N. Y. 209.

Appeal from order of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial. (Reported below, 3 Hun, 575.)

This action was brought upon a promissory note made by defendant, payable to the order of Frederick Lambert, who was at the time one of the firm of Lambert & Lincoln. The note was made for the accommodation of said firm and was discounted by the North River Bank and the proceeds passed to the credit of the firm. Soon after the firm was dissolved, Lincoln agreeing to settle up the firm business. About a week before the note matured Lincoln wrote to the plaintiff, who lived in Canada, asking him to take the note and to send money to take it up; this the plaintiff did. Lincoln deposited the money in the bank to his individual credit and upon the day the note fell due gave his check for the amount thereof. He received the note and directed the clerk to have it protested "to hold the indorser and maker." Nothing was said by him about a purchase or transfer of the note or that he was acting as agent, and plaintiff's name was not mentioned nor the bank informed that the money belonged to plaintiff. The note was protested and then sent by Lincoln to plaintiff. It was not canceled by the bank.

Thos. H. Hubbard, for the appellant.

C. F. Brown, for the respondent.

EARL, J. The defendant made the note in suit for the benefit and accommodation of the firm of Lambert & Lincoln. It was discounted and the proceeds passed to their credit by the North River Bank. Each member was therefore bound, as to the maker, to pay the note, and thus save him from liability on account thereof. Before the note became due the firm was dissolved, and Lincoln was to close up its business. Plaintiff lived in Canada, and Lincoln wrote him, requesting him to take up the note and furnish the money for that purpose. Plaintiff, a few days before the maturity of the note, sent Lincoln the money, which he placed in the bank to his individual credit. On the day the note fell due he went to the bank, and, by his individual check, paid the note to the discount clerk, who knew at the time that it was an accommodation note. He did not assume to act as agent for any one, and did not ask to have the note transferred to any

one, and did not mention plaintiff's name in any way. It is true that he asked to have the note protested so that he could hold the indorser and maker, but he did not disclose why he wanted to hold them. After he had thus paid and taken it, he sent it to the plaintiff. Upon such a state of facts, did plaintiff take his title from the bank or from Lincoln? If he took it from the bank, he took the place of the bank, and his title and right to enforce it were as good as those of the bank at the time he took it. But if he took it from Lincoln, it being past due, he took it subject to any defence defendant could have made if sued by Lincoln, and in such case defendant's defence would have been perfect. He could not be successfully sued by either of the persons for whose accommodation he made the note.

Plaintiff did not take title from the bank. It matters not that he furnished the money, and that Lincoln promised to use it in taking up this note for him. It matters not that the note was protested so that the indorser and maker could be held, or that the bank did not intend absolutely to discharge and cancel the note. The question is, did the bank transfer or sell the note to the plaintiff? To make a sale or transfer takes two parties, one to sell and the other to buy, and the bank could not be made a seller without its knowledge or consent. It was not bound to sell or transfer the note. All it was bound to do was to surrender it upon payment by the person liable to pay it. A seller in such a case incurs some obligation by the sale, although he does not indorse the paper. He impliedly warrants that the paper is genuine and all it purports to be on its face, and he cannot be drawn into this implied warranty without his consent. (*Eastman v. Plumer*, 32 N. H. 238; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Morrison v. Currie*, 4 Duer, 79; *Aldrich v. Jackson*, 5 R. I. 218; 2 *Parsons on Notes and Bills* [2d ed.], 37.) All the bank did in this case was to take payment of the note, and deliver it up to a party paying and liable to pay, after protesting it, so that he could make such use of it as the law and the facts would authorize. It did not transfer or intend to transfer it. The plaintiff, therefore, took no title to it from the bank, but he took it from Lincoln, and cannot, therefore, enforce it against the defendant.

The order of the General Term must, therefore, be affirmed, and judgment absolute ordered against the plaintiff, with costs.
All concur.

Order affirmed and judgment accordingly.

Larkin v. Hardenbrook (1882), 90 N. Y. 333.

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 15, 1881, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to recover the amount of a promissory note executed by defendant to Isaac C. Loper, plaintiff's testator, which the complaint alleged had been lost or destroyed.

The referee found that said Loper executed to defendant a deed of certain premises, and in consideration thereof, the note in suit was executed, and delivered to the grantor, who thereafter voluntarily and intentionally canceled, destroyed, and surrendered up the same to the defendant.

Further facts appear in the opinion.

J. J. Perry, for appellant.

John J. Armstrong, for respondent.

MILLER, J. The note described in the complaint was given by the defendant to the plaintiff's intestate, upon the conveyance to him of certain real estate, and as a consideration therefor, on the 11th day of October, 1870. The referee before whom the trial was had has found that in or about the month of January, 1871, the grantor voluntarily and intentionally canceled, destroyed and surrendered up to the defendant said security and note, and as a conclusion of law, the intestate discharged the defendant thereon, and that no recovery could be had either on the note or on the original consideration. We think that the finding of fact by the referee is sufficiently supported by the evidence, and that the conclusion arrived at was the legal and necessary result of said finding. The rule seems to be well settled by the authorities that where an obligee delivers up the obligation which he holds against another party, with the intent and for the purpose of discharging the debt, where there is no fraud or mistake alleged or proven, that such surrender operates in law as a release and discharge of the liability thereon; nor is any consideration required to support such a transaction when it has been fully executed. (Bouv. Law Dic., title Release; *Albert's Exrs. v. Ziegler's Exrs.*, 29 Penn. St. 50; *Beach v. Endress*, 51 Barb. 570; *Doty v. Wilson*, 5 Lans. 10.)

There certainly could not be higher evidence of an intention to discharge and cancel a debt than by a destruction and surren-

der of the instrument which created it, to a party who is liable by virtue of the same. In this case the evidence shows that the deed and the note were executed under somewhat peculiar circumstances, and it may perhaps be inferred that the design was to protect the property of the grantor from liability to creditors. While these facts would not exonerate the defendant from an obligation he assumed in taking the conveyance and giving the note, yet under the decisions cited the grantor had a perfect right to surrender and cancel the note, and the testimony shows that on being applied to for the note, and it being stated to him that the business was settled, he left the room where he was, returned and produced a piece of paper with the defendant's signature, he said it was the signature to the note and "that settled it," and handed the same to the person who made the application on behalf of the defendant.

These facts, together with the findings of the referee, are, we think, conclusive in regard to the surrender or destruction of the note, and upon no legal ground can the action of the plaintiff be maintained. The fact that the deed was absolute upon its face and expressed a consideration cannot affect the right of the holder of the note to cancel and discharge it, or to make a valid gift by delivery of the same to the maker thereof, and the admission of evidence to show such a transaction does not violate the well-established rule of law that parol evidence is inadmissible, and cannot be introduced to contradict the deed or to impair its legitimate effect. The execution of the deed and note, and their delivery, constituted one transaction, and the surrender of the note is another and a different one, distinct and independent of itself, and having no relation whatever to the original transaction. Nor is proof of such surrender evidence tending to establish an intention on the part of the grantee to reconvey the property, but proof of the act of the grantor by which he released and discharged the grantee from the obligation which he had assumed. We do not perceive that any rule of evidence was violated by the admission of the evidence establishing the surrender and cancellation of the note by the original grantor. The fact that defendant did not offer to reconvey the premises is not a proper subject of consideration in this action, which involves simply the liability of the defendant upon the note in question.

It may be conceded, as is claimed by the counsel for the appellant, that the money consideration and acknowledgment of its payment expressed in the deed is *prima facie* evidence that such was the consideration; but this presumption does not inter-

fere with the right to show an independent act by which an obligation taken in consideration of a conveyance was given up voluntarily to the party who executed it.

After a careful consideration of the position urged by the counsel for the appellant and the authorities cited by him, we are unable to discover any ground of error in the trial court in holding that the complaint should be dismissed.

There was no error on the trial in the admission of testimony or in the refusals to find as requested by the counsel for the appellant, or in any of the rulings to which exceptions were taken by him.

The judgment should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

Shaw v. Pratt (1839), 22 Pick. 305.

Assumpsit on a joint and several promissory note for the sum of \$3464, dated November 30, 1833, made by the defendant and John B. Pratt, and payable to the plaintiff or bearer, in annual instalments with interest.

The defendant offered in evidence a writing dated June 23, 1838, signed by the plaintiff, but not under seal, which was in the following words:

"In consideration of an assignment by John B. Pratt of a mortgage and the notes given to him by Sydney S. Pratt for \$2800, to me, I hereby agree and bind myself and my heirs to discharge the note, being a joint and several one, signed by John Pratt and John B. Pratt, and held by me, so far as John B. Pratt is or may be liable to pay the same, except that this agreement shall not operate in any way to discharge or affect the suit already begun by me against John Pratt, and for which a farm in New Ashford has been attached on said note."

It was admitted by the plaintiff, that the note in suit was given for the consideration of the sale of a tract of land to the defendant; and that the defendant had subsequently conveyed the land to John B. Pratt, who verbally agreed with the defendant to assume the payment of the note; but the plaintiff had no agency in this arrangement and never assented thereto.

It was further admitted by the parties, that the notes received by the plaintiff of John B. Pratt, were not due, but were payable at a future time.

The defendant contended: 1. That he was legally discharged

from all liability to the plaintiff upon the note in suit; and 2. That the payment of the sum of \$2800 was to be applied in discharge of so much of the note as should first become due and payable.

As the case presented merely questions of law, it was taken from the jury by consent. If in the opinion of the whole court, the plaintiff was entitled to maintain this action, the defendant was to be defaulted, and damages to be assessed for such sum as the court should direct. But if the court should be of opinion that the evidence constituted a legal defence to the action, the plaintiff was to become nonsuit.

Briggs and Porter, for the plaintiff.

Rockwell and Tucker, for the defendant.

DEWEY, J., delivered the opinion of the court. It is contended, that the agreement made by the plaintiff with John B. Pratt, one of the promisors of the note declared upon in the present action, to discharge him from all liability to pay the same, has the effect to release and discharge his co-promisor, the present defendant.

There are, it seems to us, several objections to this instrument as a release of the defendant.

1. It is very doubtful whether it is anything more than an agreement to discharge, and therefore not to have the effect of a present actual discharge.

2. As an agreement to discharge John B. Pratt, it is accompanied with an express stipulation excluding any such effect as to the defendant.

3. There is another objection entirely fatal to this defence, which we have more particularly considered. The instrument relied upon as a release of all the promisors of the note, is not under seal, and is not therefore a technical release. Nothing but a technical release under seal discharging one of several promisors, can operate to discharge the other promisors from their liability on the contract. This principle is well settled, and sustained by many adjudicated cases. *Walker v. M'Culloch*, 4 Greenleaf, 421; *Harrison v. Close*, 2 Johns. R. 449; *Rowley v. Stoddard*, 7 Johns. R. 209; *De Zeng v. Bailey*, 9 Wendell, 336.

The only remaining inquiry is, whether the amount received from John B. Pratt, shall be applied in payment of the money already due, or be taken to be in discharge of that part of the note which is payable at a future day. Upon recurring to the facts stated in the case, it appears, that there was no actual payment of money, but a transfer to the plaintiff of a certain mort-

gage and notes, which notes were not payable, by the terms of them, until a period long after the transfer. Had there been no application of this payment, by the mutual understanding of the parties, the question must have been decided by those general rules which have been adopted in the application of payments in such cases; but, as it seems to us, in the present instance, the parties have by their own stipulations provided for the application of the amount thus received. The agreement was in terms, that this payment was not to operate in any way to discharge or effect this suit.

This stipulation clearly imports some other and different application of the amount received by the assignment of the notes and mortgage, than in discharge of that part of the note upon which judgment is now asked by the plaintiff. It can have the limited effect stipulated by the parties in the written instrument, only by applying the same in discharge of that part of the note not due, and entering judgment for the plaintiff for so much as remains unpaid of that part of the note which had become payable at the time of the institution of the suit.

Judgment for the plaintiff.

The Madison Square Bank v. Pierce (1893), 137 N. Y. 444.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit.

This was an action upon a promissory note.

The facts, so far as material, are stated in the opinion.

David Keane, for appellant.

John Delahunty, for respondent.

FINCH, J. We have a novel and interesting question before us on this appeal, although its apparent importance will lessen as we pass from first impressions to some slower reflection. It arises upon facts which are very brief and simple and may at once be stated. The defendant, Pierce, made his promissory note payable to his own order and indorsed it to the Bates Co., Limited, which indorsed it to the plaintiff bank; the latter discounting it and paying the proceeds over to the immediate indorser. Thereafter the Bates Co. became insolvent and passed into the hands of a receiver, who paid to the bank upon the liabil-

ity of the indorser seventy-three and one-quarter per cent of the amount secured by the note. Later, the bank sued Pierce, the maker, and recovered judgment for the full amount of the note in spite of the proof showing the payment made by the receiver, and in disregard of the claim asserted by the defendant that he should only be held liable for the balance remaining unpaid. That judgment has been affirmed by the General Term, Judges Daniels and Barrett each writing very strong and valuable opinions in support of their doctrine, and relying upon the authority of *Jones v. Broadhurst* (9 M. G. & S. 177; 67 Eng. Com. L. 175), which fully warrants their conclusion. The question does not seem ever before to have arisen in this country, and we are left at liberty to examine the English rule and to follow it or not as we approve or disapprove its logic and its consequences.

We are not to regard the note as being accommodation paper, but must assume its transfer for value. The form of the transaction is equivalent to what it would have been if the Bates Co. had been named as payee, and loses none of its force by the intervention of the maker as first indorser. That indorsement, in the form adopted, was needed for the regular transfer of title, but does not change or affect the nature and character of the maker's liability. He remains the ultimate debtor, the person who ought to pay the debt, in preference to and in exoneration of all the other parties to the paper, who in some form or other are entitled to have final recourse to him. And it is to the case of such a maker of the note or such an acceptor of the bill of exchange that the English rule alone applies; and it is explicitly declared inapplicable where the indorser or drawer is the real debtor, although in form only secondarily liable.

Pierce, therefore, was the ultimate debtor, and the party who ought to pay the note, both in discharge of the obligation to the holder and in exoneration of the indorser. When the bank sued on the note, it was the legal holder and the legal party in interest. Upon production of the paper and the usual proof, judgment against the maker for the full amount was inevitable, unless some defense should be interposed. The only possible one for Pierce was part payment, and he was compelled to assert, and his counsel are compelled to argue, that the money paid by the indorser to the holder inured to the benefit of the maker as a payment on his debt. But that doctrine cannot prevail for very obvious reasons. The indorser's payment did not in the least lessen or satisfy the maker's debt. He owed it all exactly as before. What had happened possibly changed somewhat the

real creditor, but left the whole debt due and unpaid. To whom he should pay might become a new question, but how much he should pay in discharge of the note was not made doubtful in any degree. What the receiver advanced to the holder is familiarly described as a payment; but it was such relatively to the indorser's liability alone; while relatively to the obligation of the maker, it was an equitable purchase instead of a payment. That view of it was taken in a very early case, the decision of which depended necessarily upon it. In *Callow v. Lawrence* (3 Mau. & Sel. 95), it appeared that one Pywell drew a bill upon Lawrence to his own order, which Lawrence accepted. The drawer indorsed the bill to Taylor, who discounted it and thereafter indorsed it to Barnett. It was protested for non-payment. The drawer paid Barnett the full amount and took the bill and, striking off the indorsements of Taylor and Barnett, transferred the bill to Callow, who sued the acceptor upon it. The latter claimed that the bill was paid and extinguished, which the court denied, saying that the drawer "became the purchaser of the bill" when he paid and took it up out of Barnett's hands; that it was not paid by the drawer, *animo solvendi*, in order to extinguish it, but only to redeem himself from the situation in which he stood. That must always be true of payment by indorser to holder, where the maker is the ultimate debtor. To the extent of the money paid, the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes, *pro tanto*, the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due to the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership.

In the present case there was no privity between maker and indorser as it respects the action of the latter. He paid not as the agent of the maker, not at his request, not for his benefit, and under no duty to relieve him, but independently, upon his own obligation, to lessen his own responsibility, and not at all to discharge the ultimate debt which it was the maker's duty to pay. It seems very clear, therefore, that the maker cannot utilize for his own benefit a payment which, as to him, is not a payment upon the debt. It becomes, as I have said, merely a question to whom he shall pay and who may sue for and collect the whole unpaid sum. In that question the maker has no concern beyond

the inquiry whether he may become liable to different persons for the same debt and encounter the danger of paying it twice. I can discover no such peril. The judgment in favor of the holder is a bar to any other suit on the same note, and payment to the holder discharges the note utterly. Ordinarily, the indorser cannot recover except upon the note and as holder and in accordance with the law merchant. If he ever has any other right of action against the maker, it is either in equity or by force of some facts beyond the bare relation established by the paper. And where the note is merged in the holder's judgment or paid in full to him by the maker, the indorser's only right is through the judgment or against the proceeds, if he has made a partial payment to the holder. That does the indorser no wrong. If he is not content that the holder shall collect to some extent as his trustee, he may prevent it by payment in full to the holder and so entitle himself to the possession of the note on which to sue, or if judgment has been obtained, to be subrogated to all of the rights of the plaintiff therein.

I think this result is clearly indicated by our own decisions. In *Mechanic's Bank v. Hazard* (13 John. 353), the maker of the note had been arrested in an action upon it and his bail sought to relieve themselves by force of a payment made by the indorser to the holder, but such effect was denied to it; the court saying that it was not a payment by or on behalf of the maker, or of which he or his bail could avail themselves. And in *Guernsey v. Burns* (25 Wend. 411), where the suit was by the holder, representing the legal title and interest, it was said to be no defense to the maker and no concern of his that some property in the note was in another.

It thus becomes apparent that there is no very great importance in the question which method of securing payment from the maker is adopted since the same result follows from each and that it narrows down to the inquiry whether as matter of correct doctrine and of convenience in practice the holder may recover the whole debt against maker or acceptor for himself and as trustee for the indorser to the extent of his acquired interest; or whether he shall take judgment only for the balance, leaving the indorser to sue in some way and on some theory, which apparently could not be upon the note because already merged in the judgment, but might be for money paid for use of the maker since he gets the benefit of it in the reduction of the judgment, as was held in *Pownal v. Ferrand* (6 B. & Cress. 439), where the holder deducted the indorser's payment from the levy

against the maker. The former seems to me to be the logical and convenient method and so I think we should follow the English doctrine.

I have not underrated the assault made upon it by the appellant. He asserts that *Jones v. Broadhurst* is contrary to the earlier cases and has been criticized and shaken by the later ones. I have examined them all, with some wonder at the amount of learning and ingenuity expended upon the subject. (*Pierson v. Dunlop*, Cowper, 571; *Walwyn v. St. Quintin*, 1 Bos. & P. 652; *Bacon v. Searles*, 1 H. Bl. 88; *Hemming v. Brook*, 1 Car. & M. 57; *Randall v. Moon*, 12 C. B. 261; *Cook v. Lister*, 13 C. B. [N. S.] 543; *Solomon v. Davis*, 1 Cahabe & Ellis, 83; *Thornton v. Maynard*, 10 Com. Pl. L. R. 695.) The prior cases were very fully and carefully reviewed by Baron Cresswell in the opinion rendered in *Jones v. Broadhurst*, and of the subsequent cases I deem it only necessary to say, that, along with some criticism and occasional doubt, the doctrine has remained substantially unshaken, and the case last cited was declared by Lord Coleridge to be the accepted law.

It must not be forgotten, however, and I may prudently repeat, that the doctrine has no application to accommodation paper, and rests wholly upon the actual and ultimate indebtedness of maker or acceptor as the party who ought to pay. In such a case as that, which correctly describes the one now before us, and where no disturbing facts affect the relations of the parties as fixed by the paper itself, I think the holder may sue and recover the full amount, receiving so much of the proceeds as represents a part payment by the indorser as trustee for him.

It follows that the judgment should be affirmed, with costs.

All concur, except MAYNARD, J., dissenting.

Judgment affirmed.

Schwartzman v. Post imp. (1904), 94 App. Div. 474, 87 N. Y. Supp. 872, 84 N. Y. Supp. 922.

Appeal by the plaintiff, Abraham Schwartzman, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 16th day of November, 1903, which order reversed a judgment of the City Court of the city of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 15th day of February, 1903, upon the verdict of a jury, and also (as stated

in the notice of appeal) from a judgment of reversal entered in the office of the clerk of the city of New York on the 13th day of January, 1904, upon said order of the Appellate Term.

Alexander Rosenthal, for the appellant.

B. Lewinson, for the respondent.

Determination of Appellate Term affirmed, with costs, on the opinion of the court below, and judgment absolute ordered for defendant, with costs.

Present—VAN BRUNT, P. J., PATTERSON, INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ.

LAUGHLIN, J. (dissenting). According to the testimony of the plaintiff the note was not paid nor was it surrendered up to the defendant Post upon the understanding that it was to be deemed unpaid, but on the distinct agreement that the defendants were to remain liable for the balance for which plaintiff has recovered in this action. The defendants did not, therefore, in my opinion, by this surrender become holders of the note in their "own right" within the intent and meaning of subdivision 5 of section 200 of the Negotiable Instruments Law (Laws of 1897, chap. 612), and the transaction did not constitute a discharge of the note. The defendant Post merely became the bailee thereof for the payee.

The following is the opinion delivered by FREEDMAN, P. J., in the court below :

FREEDMAN, P. J. This action was brought to recover an alleged balance of \$1,750 claimed to be due upon a demand note for \$5,000, dated May 1, 1899, payable to the order of the maker, the defendant Post, and indorsed by him and his father, the defendant Postawalsky. Postawalsky was not served with the summons and did not appear. After a trial by a jury a verdict for the amount claimed was rendered in favor of the plaintiff. The plaintiff's complaint, originally, averred that he is "now the lawful owner and holder" of the note in suit, but it was subsequently amended by striking out the allegation that plaintiff was the "holder." The answer denied the delivery of the note to the plaintiff and that he was the owner thereof, and set up, among other defenses, that the note had been delivered up and surrendered to Post, the maker, about April 9, 1900, and that defendant had ever since been the holder thereof.

At the beginning of the trial, the note, in pursuance of a notice given by plaintiff's attorney, was produced by the defend-

ant Post, and by plaintiff's attorney offered and received in evidence.

The testimony of the transaction out of which the cause of action arose, as given by the parties, is very conflicting, and a reading of the record convinces one that neither party has given a complete statement of the facts.

The plaintiff's version, however, was accepted and believed by the jury, and must, therefore, for the purposes of this appeal be taken as true, and, briefly stated, as follows:

In 1898 the plaintiff and the defendant Postawalsky were copartners in the cloak business. This partnership was dissolved by mutual consent in 1899, and plaintiff received the note in question for his interest in said business. Subsequently, upon demanding payment of the note of the defendants, Post told the plaintiff that he (Post) could not pay the full amount of the note, but would pay \$2,000 if the plaintiff would give up the note. This offer was afterwards increased by Post to the sum of \$2,500. Plaintiff then authorized his brother (Schwartz) to continue the negotiations with Post. For some reason, not appearing, the plaintiff had placed the note with one Kohn, who testifies that he also called upon Post in regard to obtaining payment of the note, and that Post refused to pay in full. Plaintiff's brother (Schwartz) testifies to similar conversations with Post. In all of the conversations Post is alleged to have said, in substance, that unless the amount offered was accepted by the plaintiff and the note given up, that he, Post, would "protect" himself, that "I have been through the mill once before and I know how to take care of myself." These witnesses also testify that Post promised to pay the balance of his indebtedness, but insisted upon the surrender of the note to him. Matters between the parties culminated in a meeting of Post, Kohn, one Kohler, attorney for Post, one Essberg, attorney for plaintiff or his brother Schwartz, and Schwartz, at Essberg's office, at which time Post paid \$2,750 and Essberg \$500 to Schwartz, who then gave the note to Essberg. The \$3,250 was then paid plaintiff, and the note eventually given to Post, although when Post came into possession of the note does not appear, nor is it shown for what reason Essberg contributed the sum of \$500 towards the amount paid the plaintiff.

At the close of the plaintiff's case and again at the close of the whole case the defendant's attorney moved to dismiss the complaint upon the ground that "the plaintiff had failed to establish a cause of action and upon the ground that by his own admis-

sion of the delivery and surrender of the note by him to the defendant, (the plaintiff) extinguished any liability on that note. * * * My contention is that the delivery of that note by the plaintiff to the defendant constituted a discharge and cancellation of that note."

I am of the opinion that the defendant Post is right in this contention.

The cause of action is based wholly upon the note. Subdivision 5 of section 200 of the Negotiable Instruments Law provides that a negotiable instrument is discharged "when the principal debtor becomes the holder of the instrument at or after maturity in his own right."

The instrument in question was a negotiable note. The term "holder" is defined in section 2 as follows: "'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof," and section 3 contains the following definition: "Person primarily liable on instrument.—The person 'primarily' liable on an instrument is the person who by the terms of the instrument, is absolutely required to pay the same."

The words of subdivision 5 of section 200, "in his own right," merely exclude such a case as that of a maker acquiring the instrument in, purely, a representative capacity.

The case at bar comes exactly within these provisions. Post was the maker of the note and primarily liable thereon; it was surrendered to him and he became the "holder" thereof without fraud or mistake in "his own right."

Prior to the adoption of the Negotiable Instruments Law, it has been held that if a note be surrendered by the payee to the maker the whole claim is discharged. (*Jaffray v. Davis*, 124 N. Y. 164, 170; *Ellsworth v. Fogg*, 35 Vt. 355; *Kent v. Reynolds*, 8 Hun, 559; *Beach v. Endress*, 51 Barb. 570; *affd. in Larkin v. Hardenbrook*, 90 N. Y. 333.)

Whether the plaintiff can maintain an action upon the original indebtedness or upon the defendant Post's promise to pay the balance due, the consideration therefor being the plaintiff's surrender of the note, need not now be determined.

As the foregoing views necessitate a reversal of the judgment the other alleged errors need not be considered.

Judgment reversed, new trial ordered, with costs to the appellant to abide the event.

DISCHARGE OF PARTY SECONDARILY LIABLE.

§ 122.

Shutts v. Finger (1885), 100 N. Y. 539.

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made July 2, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought against defendant as indorser of a joint and several promissory note dated March 19, 1866, for \$500, payable on demand, with interest, made by Jacob Niver, James Ham and Norman Niver.

Defendant became the owner of the note soon after its execution; he indorsed and transferred it in April, 1868. Plaintiff became the owner in 1869. Interest was regularly paid upon it by Jacob Niver, one of the makers, up to April, 1875. In 1876 said Jacob Niver died. In March, 1877, plaintiff presented the note to the administratrix of the estate of said deceased maker and demanded payment, and on the same day demanded payment of the other makers, which was refused, and defendant was notified of such presentment, demand and non-payment. No demand was made prior to that time. The makers of the note were not copartners.

John B. Whitbeck, for appellant.

Samuel Edwards, for respondent.

RUGER, Ch. J. We think the court below erred in applying the doctrine of *Merritt v. Todd* (23 N. Y. 29) to the facts of this case, and that its true solution is to be found in the rules prescribing the duties and obligations of a creditor to his surety. This court, in the case of *Parker v. Stroud* (98 N. Y. 379), following *Merritt v. Todd*, expressly reserved from the effect of the decision, the question as to the liability of the indorser, when the maker had been released from liability, by the *laches* of the holder. The doctrine of *Merritt v. Todd* has been so long acquiesced in, and has been followed and approved in so many cases, that it would be impolitic now to permit the rule there laid down to be questioned or disturbed, and it must, therefore, be considered as settled law in this State that a note payable on demand, with interest, is a continuing security, and no cause of action arises thereon against an indorser until after actual demand.

The defendant is here sued as indorser of a demand note, dated March 19, 1866, made by Jacob Niver, James Ham and Norman Niver, payable, with interest, to Francis O'Coner or

bearer. The defendant afterward became the owner and holder of the note, and in April, 1868, transferred it to one Potts, and at the request of Potts then indorsed it. Potts held the note about one year, when he sold it to the plaintiff, who has ever since remained its owner. Jacob Niver paid interest on the note annually until March, 1875, since when no payments have been made thereon. Jacob Niver died in 1876, and administrators of his estate were then appointed. In March, 1877, the plaintiff, after demanding payment of the note of the makers, James Ham and Norman Niver, and also of the personal representatives of Jacob Niver, and failing to collect it, notified the defendant of the fact and of his intention to hold him for its payment, and thereupon commenced this action in June, 1878.

The authorities now uniformly hold that the statute commences to run, upon a note payable on demand, in favor of the maker, at its date (*Herrick v. Woolverton*, 41 N. Y. 481; *Wheeler v. Warner*, 47 id. 519; *Parker v. Stroud*, 98 id. 379), and that the expiration of six years from such date constitutes a bar to an action thereon unless a renewal of the cause of action has been effected by partial payments or otherwise. The makers in this case were not partners, and occupied no such relation to each other as constituted the party making payment, in any sense, the agent of the other for such purpose, and it necessarily follows that the payments made by Jacob Niver did not renew the note as to the other makers, and they were, therefore, discharged from liability thereon, several years prior to any demand of payment from them. (*Van Keuren v. Parmelee*, 2 N. Y. 524; *Schoemaker v. Benedict*, 11 id. 176.)

It must be conceded upon settled principles of law, that defendant, after payment of the note, would have no recourse for indemnity against any of the parties thereto, except upon the note itself, and if any of such parties were relieved from liability thereon, either by the act, or *laches* of the holder, the indorser lost his right of action against such party. The rule which, upon payment of a note, implies a promise by the maker to repay the indorser the amount paid by him, proceeds upon the theory that the payment has been made at the request of the maker, and the cause of action arising in favor of the indorser, is based upon the act of payment, and not upon the note. (*Brand on Suretyship and Guaranty*, §§ 176, 179.) Where, however, commercial paper is indorsed after its execution, to subserve the interests of the indorser, no such promise of repayment can be implied, and the only remedy for indemnity, from the prior

parties is by resorting to the paper itself. (Brandt on Suretyship and Guaranty, § 180.) Upon payment of such obligation, an indorser is entitled to demand its possession from the creditor, with the right of subrogation, to all securities and remedies possessed by him against the prior parties thereon, unimpaired by any act or laches of such creditor. (*Goodyear v. Watson*, 14 Barb. 481; *Clason v. Morris*, 10 Johns. 524; *Beardsley v. Warner*, 6 Wend. 613; Daniels on Neg. Inst., § 1306; *Townsend v. Whitney*, 75 N. Y. 432.)

The obligation which a party assumes upon indorsing a note is, among other things, to pay it, in case the parties primarily liable thereon, after demand, neglect or refuse to do so. The demand stipulated for is an essential part of the indorser's contract, and the same considerations which induce its requirement, also require that it shall be made upon an existing cause of action, and of parties who are legally liable to respond in damages for its non-performance. (Daniel on Neg. Inst. § 1308.) The contract, except in the case of parties originally incompetent to contract, is predicated upon the assumption that there is a legal liability against parties, upon whom the demand is to be made. A demand upon a party after he has ceased to be liable would be an idle ceremony and a fraud upon the meaning and spirit of the indorser's contract.

Except in the case of a partnership note, the demand must also be made upon each of the several makers at the maturity of the note. (*Gates v. Beecher*, 60 N. Y. 518). It would be quite absurd to claim that a note could mature after the parties thereto had been discharged by the expiration of the period of limitation, and a demand upon such parties, after the bar of the statute had fallen, would not, therefore, be a compliance with the conditions of the indorser's liability. It was held in the case of an indorser of a note secured by mortgage upon real estate, the lien of which was lost by the neglect of the creditor to record it, that the surety was discharged, the court saying that it worked a change in the terms of the surety's undertaking. "He only guarantees the note as secured by the mortgage, and when the mortgage was destroyed his contract was no longer existent." (*Atlanta Nat. Bk. v. Douglass*, 51 Ga. 205.)

From the foregoing considerations it would seem to follow that, in order to sustain the contention of the respondent, we would be required to hold that an indorser remains liable upon a note, after his principals have been discharged from their obligation upon it, and that his right of subrogation entitles him

only, to the possession of a security rendered worthless by the neglect of the creditor. Where such consequences are produced by the direct action of the creditor all of the authorities concur in holding that it constitutes a good defense to the indorser, and it is difficult to see why the same consequences produced by the deliberate *laches* and inaction of the creditor should not lead to the same result.

There are cases holding that an indorser is not discharged by the delay of the holder in prosecuting the maker, at a time when the debt could be collected from him, and such remedy has become fruitless by the maker's subsequent insolvency. (*Trimble v. Thorne*, 16 Johns. 152; *Wells v. Mann*, 45 N. Y. 327.) These cases proceed upon the theory that it is the privilege and duty of the indorser, after receiving notice of dishonor, to pay the note and enforce it himself, if he fears the impairment of the maker's solvency through lapse of time. We have, however, been unable to find any case holding that an indorser can be made liable who has had no notice of dishonor, or opportunity to take up the note, where the liability of the maker has been discharged by the *laches* of the holder in allowing the period of limitation to run thereon.

The responsibility of the indorser for the loss occasioned by the bankruptcy of a maker, after the maturity of a note, is put upon him because of the opportunity which is afforded him of protecting himself, and when he is deprived of this opportunity by the neglect of the holder, we know of no principle of law which will hold him liable for the consequences of such a loss.

It is a general rule that whatever discharges the maker or acceptor of a bill or note discharges the drawer and indorser, who are sureties, for the contract which they undertook to assume thus passes out of existence by the act of the beneficiary. (Daniel on Neg. Inst., § 1306.) It is also said that "whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him but from which his discharge precludes them." The contracts of the parties to a note are said to be like the links of a pendant chain, if the holder dissolves the first every link falls with it. (Daniel on Neg. Inst., § 1307.)

It was held in the case of *Beardsley v. Warner* (*supra*), that if the creditor does any act impairing the surety's claim against the maker it may be shown in defense of the surety. *Barhydt v. Ellis* (45 N. Y. 111) holds that where, by the *laches* of the creditor, the surety's means of indemnity are impaired, his liabil-

ity is discharged to the extent of the loss sustained by reason of such neglect. The necessary implication from the rule thus laid down would seem to require his absolute discharge when the responsibility of an individual liable for the whole debt has been lost by the act of the creditor.

It is among the fundamental rules applicable to the relations of principal and surety that a creditor cannot vary or change the contract to the prejudice of a surety; that he cannot extend the time of its performance, or release any security held therefor, or discharge any party therefrom, without thereby releasing the surety wholly or partially from his obligation. (Daniel on Neg. Inst., § 1308). In *Stewart v. Eden* (2 Caines, 121), it was held where the holder released one of the makers of a note, reserving, however, his liability to the indorsers, that such release did not discharge the indorsers. But it was then conceded that if the release had operated to wholly discharge such maker it would have been otherwise.

While there are some qualifications of the general rules above referred to, there are none that I have been able to find excusing a creditor, for allowing the statute to run in favor of the principals, upon a note by which they are discharged from liability. The general rule applicable to such *laches* seems to be well stated in the case of *Reese v. Barrington* (2 Lead. Cas. in Eq., part 2, p. 373, cited in the note to Fell's Law of Guaranty and Suretyship, 217). "But although the creditor is not bound to take active measures to enforce payment of the debt, and may, therefore, stop short in those which he has taken, even when their further prosecution would have been successful, yet he is not entitled to relinquish any hold which he has actually acquired on the property or estate of the principal and which might have been made effectual for the payment of the debt. This is the necessary result of the rule that a creditor shall not arbitrarily shift the burden of a debt from the party primarily liable for its payment and impose it on another whose liability is secondary."

We are, therefore, of the opinion that an indorser cannot be held upon a note payable on demand with interest, unless the holder can show a demand made of the makers upon a subsisting obligation against all of the parties thereto, and be able to deliver to such indorser upon payment by him the note, unimpaired as an obligation by any act or omission of the holder occurring subsequent to the contract of indorsement.

The judgment of the court below should be reversed and a new trial ordered, with costs to abide event.

All concur.

Judgment reversed.

Boatmen's Savings Bank v. Johnson (1887), 24 Mo. App. 316.

Appeal from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Reversed and remanded.

A. M. Gardner, with whom are *Kerr & Tittman*, for the appellant.

George H. Shields, and *Glover & Shepley*, for the respondents.

THOMPSON, J., delivered the opinion of the court.

The single question presented by this record is whether an endorser or surety is released by a composition agreement between the holder of the obligation and the maker, acceptor, or other principal debtor, which composition, in express terms, reserves every right and remedy which the holder, or obligee, has against other persons. The question must be answered upon authority, and such an agreement does not discharge the endorser or surety.

Two principles are universally conceded in respect of the rights of sureties, and are not disputed by the parties to this proceeding: (1) That a valid agreement between a creditor and his principal debtor, whereby the creditor, in consideration of the payment of a part of the debt, discharges the principal debtor, will, without more, operate to discharge a surety. (2) That an agreement between a creditor and his principal debtor, whereby the creditor agrees, for a consideration, to extend the time of payment, will, without more, operate to discharge a surety. But it is an exception to the former of these rules, equally well settled, that such an agreement will not operate to discharge a surety where the agreement itself contains an express reservation of the remedies of the creditor against sureties, or against all persons other than the principal debtor, who may be liable. (*Ex Parte Gifford*, 6 Ves. 805, 807, per Lord Eldon, L. C.; *Hubbell v. Carpenter*, 5 N. Y. 171; *Sohier v. Loring*, 6 Cush. 537; *Tobey v. Ellis*, 114 Mass. 120; *Mueller v. Dobschuetz*, 89 Ill. 176, 182; *Stirewalt v. Martin*, 84 N. C. 4; *Morse v. Huntington*, 40 Vt. 488, 496). This principle was recognized by this court in *Broadway Savings Bank v. Schmucker* (7 Mo. App. 171). It is an equally well settled exception to the second of these rules, that such an agreement will not operate to discharge a surety, where the agreement itself contains an express reservation of the remedies of the

creditor against sureties, or against all persons other than the principal debtor who may be liable. (*Ex parte Glendenning*, 1 Buck, 517; *Boulthée v. Stubbs*, 18 Ves. 20, 26; *Nichols v. Norris*, 3 Barn. & Ad. 41; *Clagett v. Salmon*, 5 Gill & J. 314; *Wyke v. Rogers*, 1 DeG., M. & G. 408; *Melville v. Glendenning*, 7 Taunt. 126; *Bangs v. Strong*, 10 Paige, 11; *Bank v. Lewis*, 8 Pick. 458; *Blackstone v. Hill*, 10 Pick. 132; *Bank v. Lineberger*, 83 N. C. 454; *Vielle v. Hoag*, 24 Vt. 46). Our supreme court made a ruling which rests upon similar reasons in *Rucker v. Robinson* (38 Mo. 154).

These two exceptions to the two rules above stated rest upon the same principle. They are grounded upon the principle that, where a contract expressly reserves the remedy of the creditor against other persons (which includes sureties), the sureties are in no way prejudiced by the agreement. By entering into such an agreement, the principal debtor impliedly consents that whatever remedies his sureties have against him shall remain open to them. They are, thereafter, at liberty to pay the debt at once, and proceed immediately against their principal for reimbursement. An examination of many decisions shows that the principles which support these two exceptions to the respective rules above stated are precisely the same. Courts adopt the same mode of reasoning in the two cases, and cite interchangeably decisions where the agreement was for a discharge of the principal debtor, and where it was merely for an extension of time to him.

This principle has been applied in a number of cases where the agreement was merely that the creditor would not sue the principal debtor within a stated period of time. (*Price v. Barker*, 4 El. & Bl. 760, 778; C. C., 30 Eng. L. & Eq. 157; *Kearsley v. Cole*, 16 Mees. & W., 128, 135; *Perkins v. Gilman*, 8 Pick. 229; *Fullman v. Valentine*, 11 Pick. 156; *Kenworthy v. Sawyer*, 125 Mass. 28; *Hagey v. Hill*, 75 Pa. St. 108). In these cases, where there is a reservation of the remedies of the creditor against all other persons, or against sureties, the reasons upon which the courts refuse to discharge the sureties, are two-fold: (1) The reason above stated, that the agreement in no way prejudices the surety as to any remedy which he may have against his principal. (2) The additional reason that a covenant not to sue can not be pleaded in bar of an action, in case it is brought in violation of the covenant, the courts proceeding upon the refinement that such a covenant affords merely the ground of an action for damages. This distinction was noticed by our supreme court in *Rucker v. Robinson* (*supra*). Whether it is well, or ill, founded, we need

not now consider. Assuming that it is well founded, the defendant's position is not helped; because, in the cases where the agreement was merely an agreement not to sue, the courts have universally rested their decisions as well upon the reason that the sureties were not prejudiced by the agreement, and hence not discharged, as upon the reason that the agreement did not prevent the creditor from suing the principal debtor at any time. An examination of numerous cases convinces us that, with one or two isolated exceptions, they afford no ground for raising the distinction which has been attempted in this case, between agreements not to sue and agreements to discharge the principal debtor entirely, reserving rights against all other persons. We should add that the statement of Judge Wagner in *The State ex rel. v. Matson* (44 Mo. 305, 308), that "a release of the principal will always discharge the surety," was an *obiter dictum* and did not correctly state the law. Nor is there anything in the provisions of section 666, Revised Statutes, to which we have been cited, which changes the rule of the common law on this subject.

We find, then, that the exception to the general rule, which supports the plaintiff's claim in this case, has been thoroughly settled in England, and in this country, by the most authoritative courts; and as we have no jurisdiction to change the law, we must hold that the circuit court erred in the view that the defendant was not liable, and in non-suiting the plaintiff.

II. The decedent, against whose estate this claim was proved, became liable as an endorser for value on a bill of exchange drawn in favor of a partnership firm of which he was a member. In view of this fact, we have thought it worth while to consider whether the statute providing for the discharge of a surety by the delay of the creditor, upon notice to sue the principal debtor (Rev. Stat., sect. 3896, *et seq.*), might not operate to change, in this state, the rule of the common law above stated. But we find, on examination of the decisions of our supreme court, that it is settled in this state that this statute has no application to endorsers, even for accommodation, of commercial paper, but that it applies only to sureties who were originally liable as such by the terms of the instrument creating liability. (*Clark v. Barrett*, 19 Mo. 39; *Miller v. Mellier*, 59 Mo. 388; *Faulkner v. Faulkner*, 73 Mo. 327, 338; recognized in *Priest v. Watson*, 75 Mo. 310, 316).

The judgment will be reversed and the case remanded.

It is so ordered.

All the judges concur.

Carroll v. Sweet (1891), 128 N. Y. 19.

See also § 188.

Appeal from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 9, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

This was an action to recover the balance of an indebtedness for services rendered. The defense of payment by check was interposed.

The facts, so far as material, are stated in the opinion.

H. E. Losey and *J. W. Bartram*, for appellant.

Carter, Hughes & Kellogg, for respondent.

ANDREWS, J.—The indorsement and transfer by the defendant to the plaintiff of the check to Woodruff operated as provisional payment only of so much of the antecedent debt owing by the defendant to the plaintiff. There was no agreement that it should be taken in absolute satisfaction of the debt and, in the absence of such an agreement, the intendment of law is that it was conditional payment only. (*Hill v. Beebe*, 13 N. Y. 566; *Bradford v. Fox*, 38 id. 289). The debt remained until discharged by payment of the check or by such dealing with the check by the plaintiff as would, in judgment of law, convert what was originally a provisional payment into an absolute one. The check was dated August 22, 1887, and was drawn on the Asbury Park National Bank, and was on the same day indorsed and delivered by the defendant to the plaintiff at the place where the bank was located.

The plaintiff on accepting the check assumed, as between himself and the defendant, an obligation to present the same to the bank for payment within the time prescribed by the law merchant, that is to say, not later than the next day after its date, and if refused, to protest the same and give notice of non-payment. (*Smith v. Janes*, 20 Wend. 192). It was not presented until the thirty-first of August, nine days after it was received by the plaintiff. The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law merchant, was a condition upon performance of which the liability of the defendant as indorser depended, and this delay was not excused although the drawer of the check had no funds, or was

insolvent, or because presentment would have been unavailing as a means of procuring payment. (*Mohawk Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 13 id. 549). A different rule obtains as between the holder and drawer of a check. As between them presentment may be made at any time and delay in presentment does not discharge the liability of the drawer unless loss has resulted. (*Little v. Phenix Bank*, 2 Hill, 425).

The action here is not upon the indorsement of the defendant, but upon the original indebtedness. If the discharge of the defendant's liability as indorser discharges also his liability as debtor for the original debt, the judgment must on that ground be reversed. In *Hamilton v. Cunningham* (2 Brock. 350), Chief Justice Marshall considered the effect of the neglect of the holder of a bill to give due notice of dishonor, whereby prior parties thereto were discharged, upon the liability of a debtor for the debt for which the bill was drawn. After showing that the authorities in which the debtor had been held discharged, proceeded upon the theory that he had sustained an actual loss, reached the conclusion that the true principle is "that if a bill be received as provisional payment, the omission to give due notice of its dishonor, deprives the creditor of his action on that bill, but does not compel him to take it in absolute payment or deprive him of his action on the original debt further than damage has been sustained actually or in legal supposition by the debtor." (See also *Gallagher's Exrs. v. Roberts*, 2 Wash. C. C. 191; *Fleig v. Sleet*, 43 Ohio St. 53). I am not sure that this doctrine is reconcilable with expressions in the opinion of this court in *Smith v. Miller* (43 N. Y. 171; S. C., 52 id. 545). That was an action to recover a debt for which the defendant had drawn his draft on J. K. Place & Co., and forwarded it to the plaintiff, the creditor. It was presented on the same day it was received to the drawees, and the plaintiffs received therefor the drawee's check on a bank and surrendered the draft. The check was not presented to the bank until the next day, when payment was refused, the drawee meanwhile having failed. The check would have been paid if it had been presented on the day it was given, which might have been done. The plaintiffs did not demand a return of the draft, and it was not protested, nor was any notice of non-payment given to the drawees. The court rendered judgment for the defendant on two grounds, *first*, that in the absence of proof of demand and refusal and notice to the drawees, according to the usual course, there could be no recovery upon the draft or upon the indebtedness upon which it was given, and *second*, on the ground of negli-

gence in failing to present the check on the day on which it was given. The last ground stated was upon the facts a satisfactory basis for the judgment, and the same principle was applied upon similar facts in *First National Bank v. Fourth National Bank* (77 N. Y. 320).

In the view we take of the present case, it is unnecessary to inquire whether the cases cited from this and other courts are in conflict, or if so which class of cases stand upon the better reason. The court in this case directed a verdict for the plaintiff, and in this we think there was error. It cannot be doubted that if there was evidence tending to show that the delay in presenting the check to the Asbury Park Bank prevented its collection, or from which the jury might find that the whole, or any part of the debt owing by the drawer of the check to the defendant, for which the check was given, was lost by reason of the delay in the presentment, or by dealings between the plaintiff and the drawer, in respect to the check, without the assent of the defendant, the case should have been submitted to the jury. To the extent of the injury, the law would treat the omission to make due presentment as tantamount to payment.

The facts most favorable to the defendant need to be stated. Woodruff, the maker of the check, when the check was given, was conducting a hotel at Asbury Park, and the parties to the action were guests at his house. The defendant was indebted to the plaintiff for dentistry work, and the former, who resided in New York, had loaned money to Woodruff for which the check was given, and on same day defendant received the check he delivered it to the plaintiff on his debt. Woodruff had an account with the Asbury Park National Bank. On the day of the date of the check the bank charged to his account a demand note held by the bank against him for \$500, but so far as appears without any notice to Woodruff, and this rendered his bank account overdrawn. Woodruff was in embarrassed circumstances, but was in the daily receipt of about \$600 from his business. He used part of the receipts for current expenses, without depositing them, and between the twenty-second and thirty-first of August he deposited \$900 in the bank to the credit of his account, and the inference is that it was applied in part to pay the \$500 note and in part to pay current checks drawn by Woodruff. On the twenty-second of August, the day on which Woodruff's check to the defendant is dated, and after it had been indorsed to the plaintiff by the defendant, Woodruff, who had been informed of the transfer, requested the plaintiff to accommodate him by holding the check

a few days, stating as a reason that he was pressed in the payment of his accounts, to which request the plaintiff assented. He asked the plaintiff to let him know when he wished to use the check, as he would then provide for it. Woodruff testified that he had money in his office sufficient to pay the check, and would have paid it at any moment had payment been insisted upon; that he was in the receipt of about \$600 a day, and that he redeemed a number of other checks which went to protest at this time; that two or three days after the conversation of the twenty-second of August he spoke to the plaintiff again, and the plaintiff informed him that he had sent the check west. Woodruff said to him that he regretted it very much, as he wished to make provision for the check. The cashier of the bank testified that there were no funds to meet the check, and that it would not have been paid if it had been presented any time after the twenty-second of August. On August thirty-first Woodruff, who was behind in his rent, was dispossessed from the hotel premises and his business was closed and he then was and now is insolvent.

It may be conceded that the only obligation upon the plaintiff, as between him and the defendant, was to present the check at the bank for payment within the time prescribed by law, and if payment was refused, to have the same protested and notice of non-payment given to the defendant. If he had performed this duty the defendant would have been apprised of the default and he would have had an opportunity to take such measures as he could to secure payment from Woodruff. One of the objects of requiring prompt notice to be given to indorsers and other parties secondarily liable on commercial paper, in case of default, is that they may have an opportunity to secure themselves. Checks are supposed to be drawn against funds of the drawer and *prima facie* where it is shown that the drawer's account was not good, the inference of injury from non-presentment would be rebutted. But where, as in this case, it is shown that the maker of the check was solicitous that it should be paid, that he had the means of payment at command and would have provided for or paid the check if payment had been insisted upon; that the holder was apprised of the facts and for the accommodation of the maker refrained from presenting the check, and presentation was delayed until open insolvency of the maker occurred and he became, by the change of circumstances, unable to provide for the check, it cannot be said, we think, that there was no legal evidence of injury to be submitted to the jury. The plaintiff, instead of taking the usual course, undertook to deal with the maker of the check in disregard

of his primary obligation to the defendant. It was for the jury to pass upon the circumstances and to find whether the conduct of the plaintiff imposed a pecuniary injury upon the defendant. To the extent of such injury the law adjudges that the debt of the plaintiff has been paid.

The judgment below should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Fallkill Nat. Bank v. Sleight et al. (1896), 1 App. Div. (N. Y.) 189, 37 N. Y., Supp. 155.

Appeal by the defendants, Alexander W. Sleight and Frances S. Titus, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Dutchess on the 4th day of April, 1895, upon the decision of the court rendered after a trial at the Dutchess Special Term, especially from that part of said judgment which adjudges that they are or may be liable for any deficiency that may arise from the sale of the mortgaged premises described in the complaint.

L. B. Sackett, for the appellants.

Herrick & Losey, for the respondent.

BROWN, P. J.—This action was brought to foreclose a mortgage upon real estate given by one Henry P. Titus to the appellants to secure them as sureties upon three several promissory notes made by said Titus and held by the plaintiff, and which mortgage was, by said appellants, assigned to the plaintiff.

The appellants appeal from that part of the judgment which adjudged them to be liable for such deficiency on the debt as might exist after a sale of the mortgaged premises. The defense pleaded was that the plaintiff had, without the appellants' consent, extended the time of payment of the notes in suit for thirty days from the date of a certain chattel mortgage executed by said Henry P. Titus and delivered to the plaintiff, and that such agreement discharged the appellants from their liability upon the notes in suit.

The mortgage sought to be foreclosed was dated January 11, 1895, and was given to secure the payment of three notes, one of which bore date March 26, 1889, and the other two April 3, 1889, all being payable on demand, with interest.

On the date aforesaid the plaintiff was the holder of said three notes, upon which there was then unpaid \$36,600, and also

of an overdue note made by said Titus for \$1800, dated July 25, 1894, and made payable four months after date.

On January 11, 1895, said Titus executed and delivered to the plaintiff a chattel mortgage, which, after reciting his indebtedness as aforesaid, provided as follows:

"Now for the securing payment of the said first above-mentioned note" (being the \$1,800 note) "or any renewal or renewals thereof, and in consideration of agreement to renew the same for thirty days, and also for securing payment of said last three above-mentioned notes, after said first above-mentioned note and any renewal or renewals thereof shall be first paid or provided for, I do hereby sell, assign, etc. etc." * * * "This mortgage is on the express condition that if the said Henry P. Titus * * * shall pay to the said Fallkill National Bank of Poughkeepsie eighteen hundred dollars, as conditioned in said first above-mentioned note, or any renewal or renewals thereof, and shall also pay the sum of thirty-six thousand six hundred dollars, as conditioned in the said last three above-mentioned notes * * * then this transfer to be void and of no effect."

The argument of the counsel for the appellants is that the intent and purpose of the agreement contained in the chattel mortgage was to postpone the payment of the three demand notes until thirty days after the date of the renewal of the \$1,800 note.

This contention cannot be sustained. The terms of the chattel mortgage fixed the order in which that security should be applied to the payment of the respective notes. It did not purport to alter the terms of the demand notes nor to postpone their payment until the maturity of the renewal of the \$1,800 note. The bank was left entirely free to sue upon the demand notes or to avail itself of the security of the real estate mortgage for their payment, and in fact this action was commenced before the expiration of thirty days from the date of the chattel mortgage. Had the appellants paid the original debt to the plaintiff there was nothing in the terms of the chattel mortgage that would have prevented their immediately suing their principal therefor. The chattel mortgage was merely a new and additional collateral security for the payment of the three demand notes. And the rule is well settled that taking a new security from the debtor without agreeing to give him time does not discharge a surety. (*Wood v. Robinson*, 22 N. Y. 564; *Cary v. White*, 52 id. 138).

The fact that the collateral may not be enforceable until a definite time in the future does not operate to extend the time of payment of the principal debt or suspend the right to sue upon

the original security. (*United States v. Hodge*, 6 How. [U. S.] 279).

In all cases where it has been held that the time of payment of the original debt has been extended by the receipt of collateral security, there has been an express or implied agreement to that effect.

Such were the cases of *Place v. McIlvain* (38 N. Y. 96) and *Hubbard v. Gurney* (64 id. 457), cited by the appellants.

In *Kane v. Cortesy* (100 N. Y. 132) the only question discussed was whether the testimony conclusively established an agreement to extend the time of payment of the original debt.

There is no question in the case before us but that the time for the payment of the \$1,800 note was extended for thirty days, and that the note was to be paid out of the proceeds of the sale of the chattels mortgaged before any of such proceeds could be applied to the payment of the three demand notes; but the testimony does not show that payment of the demand notes was to be postponed for any definite time, and the court's finding to that effect has ample support in the evidence.

The judgment, so far as appealed from, must be affirmed, with costs.

All concurred.

Judgment, so far as appealed from, affirmed, with costs.

Hagey v. Hill (1874), 75 Pa. St. 108.

Before AGNEW, C. J., MERCUR and GORDON, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the District Court of Philadelphia.

This was an action of assumpsit, brought, November 26th, 1870, by George W. Hill against John Hagey as endorser of the following note:

"\$10,000.

PHILADELPHIA, November 4th, 1867.

"Eight months after date we promise to pay to order of John Hagey, Ten Thousand Dollars, without defalcation, for value received.
E. MATLACK & SON."

(Endorsed) "JOHN HAGEY."

On the trial before Hare, P. J., the plaintiff gave the note in evidence and rested.

The defendant then gave in evidence this receipt:—

"Received, July 30th, 1868, of E. Matlack & Son, a policy of

insurance in my favor, dated this day, issued by the American Life Insurance Company, on the life of Ellwood Matlack, for the sum of ten thousand dollars. In consideration of which I hereby agree never to prosecute or demand payment of a certain promissory note drawn by E. Matlack & Son, endorsed by John Hagey, and also guaranteed by J. E. Lewars, due and protested July 7th, 1868, for the sum of ten thousand dollars; provided, however, that the premium on the said policy of insurance is promptly paid by the said Matlack, or others. And provided further, that the interest on said sum of ten thousand dollars is promptly paid to me, or my order, whenever the same becomes due. The first year's interest to be paid before the first day of May, 1869, and the second year on or before July 7th, 1870, and annually thereafter. Provided further, that no delay of demand shall interfere with any claim I may have upon the endorsers of said note. This agreement void if not complied with as above.

"GEORGE W. HILL. [SEAL.]"

E. Matlack, one of the drawers of the note, testified that he had paid one year's interest on the note, and the premium for one year on the policy of insurance.

There was evidence also that the cashier of the bank where the note was whilst plaintiff was absent in Europe, took, with the consent of the defendant, a deed from Matlack for some land, and agreed to release all claim against the drawer's stock of goods, &c., and that the plaintiff refused to ratify the arrangement, and it was rescinded without the consent of the defendant.

The defendant requested the court to charge the jury:—

1. That as the payment of the premium on the policy of insurance, by the makers of the note, disabled the holder of the note from suing thereon for one year, the endorser was discharged, unless the jury believe the endorser consented to the same.

2. That unless the endorser was informed of the delivery of the policy to the plaintiff, it was his (the plaintiff's) duty to inform the defendant of any default made in the payment of the premium, and his failure so to do discharged the defendant.

3. That if the jury believe that the holder of the note released the security held by him, by reason of the conveyance of April 15th, 1868, without the consent of the endorser, then the defendant was discharged.

The court refused the request and instructed the jury to find for the plaintiff.

The verdict was for the plaintiff for \$11,350.

The defendant took a writ and assigned for error the refusal of his points and the instruction of the court.

D. W. Sellers, for plaintiff in error.

H. T. King, for defendant in error.

The opinion of the court was delivered by

MERCUR, J.—This suit was against the endorser of a promissory note. The first assignment of error raises the question as to whether he was discharged by reason of an agreement between the holder and the maker, after the note became due, extending the time of payment. It is a well-recognized rule that an extension of time by a valid agreement between the creditor and the principal, will, as a general rule, discharge the endorser. The reasons therefore are these: The liability of the endorser to the holder is secondary and contingent. On his paying the note, he has a right of action against the principal, or of subrogation to the rights of the creditor. Hence, if time has been given, or an act has been done by the creditor which prejudices these equities in the endorser, he will be discharged.

It has, however, been repeatedly held in England and in this country, that a discharge by the creditor of the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal that the surety shall not be thereby discharged: *Byles on Bills*, 316; *Ex parte Glendenning*, 1 Buck B. C. 517; *Ex parte Carstairs*, id. 560; *Ex parte Gifford*, 6 Vesey, Jr., 805; *Boulton v. Stubbs*, 18 Vesey, Jr., 20; *Nichols et al. v. Norris*, 3 Barn. & Ad. 41 (23 E. C. L. R.); *Kearsley v. Cole*, 16 Mees. & Wels. 127; *Boaler et al. v. Mayor et al.* 19 Com. B. N. S. 70 (115 E. C. L. R.). It was said, however, by Lord Chancellor Eldon, in *Ex parte Glendenning*, *vide supra*, "Ever since Mr. Richard Buck's case, the law has been clearly settled, and is now perfectly understood, that unless the creditor reserves his remedies, he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise; for evidence cannot be admitted to vary or explain the effect of the instrument." It was held in *Wyke v. Rogers*, 1 De G., Mac. & G. 408, that parol evidence might be given to show that an agreement, which would by itself operate to release the surety, was not to have that effect.

The ground upon which an agreement to give time to the maker, made by the holder without the consent of the endorsers, upon a valid consideration, is held to be a discharge of the endorsers, is solely this, that the holder thereby impliedly stipulates not to pursue the endorsers, or to seek satisfaction from them in the

intermediate period. It can never apply to any case where a contrary stipulation exists between the parties. Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the endorsers, it will not discharge the latter. In such case the very ground of the objection is removed, for their rights are not postponed against the maker, if they should take up the note: Story on Prom. Notes, sect. 416. The same rule is recognized in *Viele v. Hoag*, 24 Vt. 46; *Morse v. Huntington*, 40 id. 488; *Clagett et al. v. Salmon*, 5 Gill & Johns. 315. The whole course of Chancellor Walworth's reasoning in *Bangs v. Strong*, 10 Paige's Chan. Rep. 11, leads to the same result.

The endorser was not a party to the contract between the holder and the maker. He was not thereby precluded from paying the note at any moment. Having paid it he would have had an immediate right of action against the maker. None of his rights were in the slightest degree impaired.

Neither the search of counsel nor our own examination has resulted in finding that the precise point has ever been decided by this court. When not in conflict with our own precedents, it is desirable that we conform to what seems to be the general rule of the commercial world. The case of *Manufacturers' Bank v. Bank of Pennsylvania*, 7 W. & S. 335, has been cited in opposition to this rule. Such is not the case. The point there decided is merely that an endorser may be discharged by the holder giving time to the maker, after judgment has been obtained against him; that the creditor must no more impair the rights of the endorser after he has obtained judgment against the maker than before.

The written instrument executed by the plaintiff below, by which he agreed with the maker to extend the time of payment, expressly declares, "*Provided further*, That no delay of demand shall interfere with any claim I may have upon the endorsers of said note." The case is thus clearly brought within the rule, and we hold that the extension of time to the maker in a manner which preserved all the rights of the endorser, did not discharge the latter.

The second and third assignments have no merit. The acceptance of the conveyance of land in the absence of the plaintiff below, by one acting without authority, and so known by the defendant below, and repudiated by the holder of the note, cannot prejudice his rights against the endorser.

The learned judge was correct in instructing the jury to find in favor of the plaintiff below.

Judgment affirmed.

RIGHTS OF PARTY PAYING INSTRUMENT.

§ 123.

French v. Jarvis (1860), 29 Conn. 347.

Assumpsit, brought against the defendant as indorser of three notes, made by one Rowland, payable to the order of the defendant, one for \$2,275, dated March 23, 1857, one for \$2,337, dated April 20, 1857, and one for \$2,510, dated May 30, 1857, all payable at six months from date. The defendant pleaded the general issue, with notice, which was closed to the court.

The notes were made by Rowland and indorsed by the defendant for the accommodation of a joint stock corporation in New York, and were by the corporation delivered to one Elliott, a broker in New York, for him to send to Connecticut and get discounted for the benefit of the corporation; for which service, if the discount was procured, he was to receive a commission. One Baldwin, who resided in New Haven in this state, was interested with Elliott in his business and in the profits to be derived from the transaction. Before the notes matured and while they were in Connecticut, Baldwin himself purchased them for value, and afterwards, before they became due, indorsed them and sold them to one Townsend, who was the owner and holder of them when they severally matured. When the notes fell due they were severally presented to the maker for payment and protested for non-payment, and notice of protest was duly given to the defendant and to Baldwin. Baldwin thereupon paid the amount of the notes to Townsend, took them up, and became again the owner of them.

The defendant claimed on the trial that Baldwin had after this continued to be the holder of the notes, and was such when the suit was brought, and that the plaintiff, French, had no such title to the notes as would enable him to maintain a suit upon them in his own name. The plaintiff denied this, and claimed to be the legal holder of the notes, and on this point the court found the following facts.

Baldwin having taken up the notes, and being anxious to secure their payment, entered into an agreement with French, in good faith, before the commencement of the suit, by which French, who was a man of energy and skill, was to investigate the affairs of Jarvis, and trace out the transmigrations of the property formerly held by him, for the purpose of discovering, if possible, property which might by legal proceedings be appropriated to the payment of the notes, and was diligently to exer-

cise his skill and tact in this business, and make such journeys, expend such money, time and labor, employ such legal counsel, and institute such suits and legal proceedings as, in his judgment, might be necessary; for all which services French was to receive, in addition to the sum of \$150 advanced to him by Baldwin, a reasonable compensation out of the ultimate avails of the notes; French to have the power to sue upon the notes in his own name, and to control all the proceedings to be instituted upon them, and to personally collect and receive the avails thereof, paying over to Baldwin the surplus of the avails, if any, that should remain after compensating himself. When the agreement was made both Baldwin and French contemplated the rendering of long and difficult services by the latter under the agreement. In pursuance of the agreement, before the commencement of the suit, Baldwin erased his own indorsement from the notes, and delivered them, indorsed in blank by Jarvis, to French, with intent to carry the agreement into effect, and to authorize and enable French to deal with the notes according to the agreement. And the court found that Baldwin did in fact convey to French the legal title to the notes, unless the law was imperatively so that a legal title to the notes could not be conveyed in the manner or for the purposes aforesaid. The court further found that French took the notes, pursuant to the agreement, and had ever since been the actual holder thereof, and that he in good faith commenced the performance of his part of the agreement, and was still engaged in such performance, and commenced and continued the suit in pursuance thereof, with the knowledge and assent of Baldwin, and that it was not certain whether or not he would ever realize from the avails of the notes more than enough to compensate him for his services and expenditures under the agreement, though it was confidently expected by the parties that much more than enough would be received by him.

It was not claimed by the plaintiff that there had been any demand on the maker of the notes for payment of either of them, or any notice to the defendant of the dishonor thereof, by the plaintiff or by any one, subsequent to the demand and notice originally made when the notes severally became due and were protested for non-payment.

The defendant also claimed that, after the dishonor of the notes, they could not be transferred to French, so as to vest a legal title in him and enable him to maintain a suit upon them in his own name. A question was also made with regard to the usurious character of the notes, which need not be more fully

stated. The court found the issue for the plaintiff, and the defendant moved for a new trial for error in the rulings of the court upon the points stated.

Dutton, in support of motion.

R. I. Ingersoll and Harrison, contra.

STORRS, C. J.—It being found by the court below that the notes in question in this suit were not, as claimed by the defendant on the trial, sold in the state of New York, by the corporation which held them, at a greater rate of discount than the legal rate of interest in that state, there is clearly no ground for the first point made by the defendant, which is founded on such a sale. The finding is conclusive on that question of fact, and is not the subject of revision before us.

The defendant next claims that Baldwin was always the legal holder of the notes, from the time when he took them up from Townsend down to the trial of this case, and therefore that the plaintiff, never having any legal title to them, could not maintain this suit. That the plaintiff must have such a title when the suit was brought, and continue to hold it to the time of the trial, is well settled. It not being claimed that he ever parted with such a title if he acquired it from Baldwin, the question on this point is, whether he ever so acquired it; and that he did, we entertain no doubt. If the circumstances found by the court below, preceding its final finding as to the conveyance of the legal title of the notes to the plaintiff, are to be regarded as furnishing evidence merely, from which conclusions of fact are to be drawn, and this court had the power to draw such conclusions, we should not probably hesitate to infer from those circumstances such a conveyance. But we have no such power, and can only decide on facts found and presented to us. It is, however, by no means clear that, independent of such final finding, enough does not appear to require us, as matter of law, to pronounce that such a title was conveyed. But it is not necessary to decide that question, because we are clearly of the opinion that the finding of the court on the fact of such a conveyance, notwithstanding its hypothetical form, is in legal effect absolute and unqualified; for the court finds that Baldwin did in fact convey to the plaintiff the legal title to the notes, unless the law be imperatively so that a legal title to them could not be conveyed in the manner and for the purposes before mentioned; and we are of the opinion that, under the circumstances stated, the law interposed no objection to such a conveyance. It was no objection to the transfer of these notes by

Townsend to Baldwin, or by the latter to the plaintiff, that they had been dishonored; for no principle is better settled than that negotiable notes are assignable as well after as before they have become due, and continue negotiable until they are paid by the party primarily liable on them, subject to the qualifications, which however have no application to the present case, that if transferred after due they are affected by the equities existing with regard to them between the original parties and that an indorser who has taken them up can not transfer them so as to render subsequent indorsers liable. (Chitty on Bills [9 Am. Ed.], 241, *et seq.*; Story on Prom. Notes, §§ 178, 180).

These notes, therefore, continuing to be negotiable, notwithstanding their dishonor, the only question on this part of the case is, whether the payment to Townsend by Baldwin of their amount and his receiving them back, was a negotiation or transfer of the notes to Baldwin, or an extinguishment of them, so that they could not afterwards be enforced against any of the prior parties; for, if the transaction was of the former character, they were plainly transferable from Baldwin to the plaintiff. On this point we are clearly of the opinion that the effect of that transaction was not a payment of the notes which operated as an extinguishment of them; that it amounted only to a repurchase of them by Baldwin, which remitted to him, and reinvested him with, his original rights, and placed him, in regard to the parties to the notes prior to himself, in the same situation in which he was before his transfer to Townsend; and that he, by such purchase, acquired the same rights as to such prior parties as any other purchaser from Townsend would be entitled to. Baldwin, having indorsed the notes to Townsend and become liable to him on that indorsement, might pay him their amount and receive them back from him, and thus redeem himself from such liability, and place himself in a situation to obtain the reimbursement to which he would be entitled from the prior parties to the notes; and this only was the legal effect of that transaction. Under a misapprehension of the point decided in *Beck v. Robley*, 1 H. Bla., 89, note, the Supreme Court of Massachusetts, in the case of *Blake v. Sewall*, 3 Mass., 556, and *Boylston v. Greene*, 8 Mass., 465, took a different view of the effect of taking up a note from the holder by a prior indorser; but in the case of *Guild v. Eager*, 17 Mass., 615, these cases, on a more careful consideration, were overruled by that court, in accordance with the more recent case of *Callow v. Lawrence*, 2 Mau. & Sel., 95, and the views we have adopted fully established.

In respect to the object or consideration of the transfer from Baldwin to the plaintiff, it is a matter with which the defendant has no concern although we perceive nothing in the transaction of a peculiar or exceptionable character.

These principles furnish a complete answer to the claim urged by the defendant, that the liabilities of the maker of these notes and of the defendant could not be legally transferred to the plaintiff, on the ground that the promise of the former had been broken and the latter had been charged as indorser. The legal title of these notes being established in the plaintiff, the well-established principle, already stated, that a negotiable note continues to be negotiable as well after as before it falls due, shows conclusively that this claim of the defendant, and the reason on which it is founded, are without force. For what constitutes the negotiability of such an instrument but the power of the holder to assign his rights in it to another? But what sort of negotiability would it be, especially in the case of the notes now in question, if this claim of the defendant were sustained? The legal title to the notes would pass to the plaintiff, but no rights whatever which were attached to them. Baldwin would not be liable by reason of his being a party to the instruments, for his name does not appear on them; and as no one but the plaintiff has the legal title to them, we do not see how any other person than himself could resort to the defendant, the prior indorser, or why, therefore, the latter would not be altogether discharged from his liability. On the ground, moreover, upon which this objection is urged, that the notes being dishonored no liability on them could afterwards be assigned, Baldwin himself, after he had taken up the notes from Townsend, could not have enforced them against the defendant, because he held them only as a purchaser after they had been dishonored. But it is unnecessary to pursue the reasoning on this point. The authorities, and those of the highest character, are decisive of it, and repel the defendant's claim. It is sufficient only to refer to them. *Williams v. Matthews*, 3 Cowen, 252; *Guild v. Eager*, 17 Mass. 615; *Callow v. Lawrence*, 3 Mau. & Sel. 95.

As to the remaining point suggested in the defendant's brief, although not pressed on the argument, that it was incumbent on the plaintiff to demand payment of the notes of the defendant, and to give him notice of their non-payment, and to which *Bishop v. Dexter*, 2 Conn. 419, was cited,—it is sufficient to say that the case has no application to the present, because there the note was not indorsed by the payee until after it fell

due; whereas, in this case, it had been negotiated before due by the defendant, and he had regularly received notice of its non-payment by the holder on its dishonor; and that notice, it is well settled, enured to the benefit of any subsequent holder. Story on Prom. Notes, §§ 302, 303, 334, 452, and cases cited.

A new trial is not advised.

In this opinion the other judges concurred.

New trial not advised.

Gardner v. Maynard (1863), 7 Allen, 456.

Contract against the acceptor of a draft for \$1000, drawn by Sanford C. Gardner, in favor of J. & C. Levy & Co., upon the defendant. The draft was duly indorsed and accepted.

At the trial in the superior court, before Allen, C. J., it appeared that the draft was protested for non-payment, and returned to Levy & Co., and was afterwards returned to the drawer, who assigned it by bill of sale to the plaintiff, with the indorsement of Levy & Co. remaining uncanceled. A witness testified that he saw the draft indorsed by one of the firm of Levy & Co., and did not see any money paid at that time.

Upon these facts, the chief justice directed a verdict for the defendant, which was accordingly rendered; and the plaintiff alleged exceptions.

J. H. Butler, for the plaintiff.

J. S. Abbott, for the defendant.

METCALF, J. These exceptions must be overruled and judgment rendered on the verdict for the defendant, upon the authority of *Beck v. Robley*, 1 H. Bl. 89, *n.* That case and this are alike in all particulars. In both, the bill was made payable, not to the drawer's own order, but to a third party who indorsed it, was accepted by the drawee, but afterwards was dishonored by his refusing to pay it, and was taken up from the indorser by the drawer, with the indorser's name remaining uncanceled. In that case it was decided that the bill was not negotiable, and that the drawer could not reissue it. And that decision has never been overruled or denied, but is cited as established law in all the books that treat of bills of exchange. See 1 Steph. N. P. 863; Story on Bills, § 223; *Guild v. Eger*, 17 Mass. 615. Opinion of Patten, J., in *Williams v. James*, 15 Ad. & El. (N. S.) 505. The doctrine of that decision is, that a bill of

exchange cannot be indorsed or negotiated, after it has once been paid, if such indorsement or negotiation would make any of the parties liable, who would otherwise be discharged. Bayley on Bills, (6th ed.) 166, 167; Chit. Bills, (12th Amer. ed.) 254, 255. As the first indorser of a bill is liable to every subsequent *bona fide* holder, although the bill be fraudulently circulated, it follows that if he leaves his name thereon, after he is entitled to a discharge, he exposes himself to liability to such holder. Therefore the bill is held not to be negotiable, in such case.

This rule of law applies only to cases in which the negotiation of a bill by the drawer, after he has taken it up on its being returned to him dishonored, would expose a discharged party to a new liability. See *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390; Bayley, Chit. and 17 Mass. *ubi supra*; *Mead v. Small*, 2 Greenl. 207.

Exceptions overruled.

Blenn v. Lyford (1879), 70 Me. 149.

Assumpsit, by indorsee against the maker of a promissory note.

D. D. Stewart, for the plaintiff.

Josiah Crosby, for the defendant.

APPLETON, C. J. This is an action of assumpsit on the following note:

"ST. ALBANS, ME., Dec. 2, 1871.

"Seven months from date, value received, I promise to pay M. E. Rice, or order, three hundred dollars, at any bank in Bangor.
H. H. LYFORD."

The note was indorsed in blank "M. E. Rice." The following words were also on the back of the note, erased with ink but legible: "Holden without demand or notice. M. E. Rice."

Granting the presumption that the plaintiff is a *bona fide* holder for value of the note before maturity, that presumption may be overcome by proof.

It appears from the testimony that the note was indorsed to one Richardson, for value, in the April following its date; that it was not paid at maturity, and that about three months after its dishonor he delivered it to Rice, the payee.

The plaintiff then received the note in suit, when overdue. The note remaining unpaid after maturity was dishonored, and it

was the duty of the indorsee to make inquiries concerning it. If he takes it, though he gave a full consideration for it, he does so on the credit of the indorser. He holds the note subject to all equities with which it may be incumbered.

As the plaintiff is the indorsee of a dishonored note, it was competent for the defendant to show that it was an accommodation note, and that it had been paid by the party for whose accommodation it was given.

That the note was for the accommodation of the payee is abundantly shown by his receipt of the date of February 22, 1872, as well as by the testimony offered and excluded.

The note being for the accommodation of Rice, it was his duty to pay it. The note being found after dishonor in the hands of the one bound to pay it, the presumption is that he paid it. 2 Par. N. & B. 220. It was competent to show that in fact he paid it, but the answer to an inquiry whether the note was paid by Rice was excluded. This was erroneous.

Assuming the note to have been paid by Rice, it was the same as if paid by the maker. It was paid by the party whose duty it was to pay it. The purpose for which it was given has been accomplished. The negotiability of a note ceases after its payment by the party who should rightfully pay it. "Now it cannot be denied," says Denman, C. J., in *Lazarus v. Cowie*, 43 E. C. L. 819, "that if a bill be paid when due by the person ultimately liable on it, it has done its work, and is no longer a negotiable instrument. * * * But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable, and his payment discharges the bill altogether."

Rice, when he took up the note in suit, had no right of action against the maker, and could not transfer to the plaintiff any better right after maturity than he had. Edwd. B. & N. 564*. *Fish v. French*, 15 Gray, 520; *Tucker v. Smith*, 4 Maine, 415.

In the cases cited by the plaintiff there are most important differences from the one under consideration. In *Bank v. Crow*, 60 N. Y. 85, the plaintiffs were the indorsees of the note for value and before maturity, and were consequently to be protected. In *Thompson v. Shepherd*, 12 Met. 311, it was held that the indorsee of a note, who receives it for value from the second indorser, after it has been dishonored by the maker, can recover thereon against the maker, although he knew when he received it that as between the maker and first indorser it was an accommodation note. But this is upon the principle affirmed by the court

in *Woodman v. Churchill*, 52 Maine, 58, that where the first indorsee of a promissory note acquires a right of action against the maker, by being a *bona fide* purchaser, without notice and before maturity, he can transfer a good title as well after as before the note becomes due.

Exceptions sustained.

Action to stand for trial.

WALTON, BARROWS, DANFORTH and LIBBEY, JJ., concurred.

RENUNCIATION BY HOLDER.

§ 124.

In re George (1890), 44 Ch. Div. 627.

Adjourned summons.

T. W. George, by his will, dated the 6th of July, 1887, bequeathed to his niece, Mrs. Margaret Anne Francis, the plaintiff, the sum of £6000, and by a codicil, also dated the 6th of July, after referring to this bequest and to the fact that he had lent the plaintiff a sum of £2000, declared, that if at his death the said sum of £2000 or any part thereof, or any interest thereon, should be owing from the said M. A. Francis, "then and in such case all moneys due to me as aforesaid shall be deducted from the said legacy of £6000 which I have by my said will bequeathed to or for the benefit of the said M. A. Francis and her children, and I direct that in such case the said legacy shall be reduced accordingly in satisfaction of the moneys due to me as aforesaid."

The sum of £2000, referred to by the testator, was lent by him to the plaintiff in September, 1886, when the plaintiff executed and gave to him a promissory note in the following terms: "On demand I promise to pay to Mr. T. W. George or his order the sum of two thousand pounds, together with the interest thereon after the rate of four pounds per centum per annum from the date hereof for value received."

Interest was paid on this note up to the 6th of March, 1889. On the 30th of August, 1889, the testator died. Some two or three hours before his death, the testator directed the promissory note to be brought to him that he might destroy it; search was made, but the note could not be found. The testator then declared to the plaintiff, in the presence of two other persons, that he wished to give the £2000 to her, and to forgive her the debt. The nurse was then sent for, when the testator told her that he had lent the plaintiff £2000, and that he wished to forgive the debt, and that he ought to have destroyed the note, but it could

not be found for that purpose; he then made the nurse promise that she would see the note destroyed, and that she would testify that it was his wish that it should be destroyed as soon as found, and he told her that she had better write this down. The nurse then and there wrote down on the back of a letter she had in her pocket a memorandum as follows: "30th August, 1889. It is by Mr. George's dying wish that the cheque (*sic*) for £2000 money lent to Mrs. Francis be destroyed as soon as found. Mr. George is perfectly conscious and in his sound mind. (Signed, Nurse T.)." This memorandum the nurse stated in evidence was, with the exception of the last sentence, written at the instance of the testator. The story told by the nurse was corroborated by another member of the family and otherwise. After the testator's death the note was found by the executors; but under the circumstances they did not consider themselves justified in paying the plaintiff the legacy of £6000 in full without the direction of the Court, and accordingly the plaintiff took out an originating summons against the executors to determine the question whether the promissory note had been duly cancelled.

Romer, Q. C., and Upjohn, for the plaintiff.

Byrne, Q. C., and Dunning, for the defendants.

CHITTY, J. (after stating the will and codicil and the promissory note, and that the question was whether the note was discharged in the lifetime of the testator, continued):

The argument for the plaintiff is, that this being a promissory note, at common law the debt would be waived, and that the Bills of Exchange Act, 1882, s. 62, sub-s. 1, has only made a limited alteration in the law, and does not apply to a waiver of a bill or note before its maturity, but only "at or after its maturity"; and seeing that the present is a note payable on demand with interest, it is said it was not "at maturity" when the testator died, and that, therefore, the case is not affected by the 62nd section. [After reading sect. 62, sub-sect. 1, his Lordship continued]:

The first point, therefore, is, when is a note payable on demand "at maturity"? That question, though not exactly in this form, has been often considered. Of the various cases which have been referred to in argument, I will take one only—*Norton v. Ellam*, 2 M. & W. 461. In that case there was a note payable with interest on demand, and the question was from what time the Statute of Limitations began to run. Baron Parke, in giving judgment, says, 2 M. & W. 464: "I entertain no doubt at all on

this point. It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all: if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan." The note I have before me was for money lent. "Where money is lent, simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*." I mention this authority alone, though there are many previous decisions to the same effect, because it appears to me to be decisive on the point that was argued with reference to the 62nd section, viz., that this note was not at maturity when the testator died.

Then comes the question, whether there is a "renunciation" "in writing" within sect. 62, sub-sect. 1. I entertain no doubt of the integrity and trustworthiness of the witnesses, and I entertain no doubt also that it was the testator's intention to forgive, or discharge this note in favour of the plaintiff. I am quite satisfied with the evidence on this point. Sect. 62, sub-sect. 1, says the renunciation must be in writing, unless the bill is delivered up to the "acceptor," and, changing the language to suit the present case, that would be, unless the note is delivered up to the maker. The statute contains provisions for the cancellations of bills of exchange, and, therefore, of promissory notes also. So that it is quite clear, that if this note had been in the testator's possession at the time, he would have had it destroyed: upon that point I entertain no doubt. I have, however, to deal with the statute, which is not confined, of course, to cases such as this, but is a statute as to bills of exchange, and has a wide operation among mercantile men; and I feel that I must be on my guard not to allow any sympathy I may have with the plaintiff on the facts of the case in any way to influence my judgment in construing this section; because I might, if I did give way on such a ground as that, be inflicting considerable injury upon merchants and others.

Now, it is plain that what must be in writing is an absolute and unconditional renunciation of rights. It is not necessary to put those words in; but that must be the effect of the document. Then the document is not to be a note or memorandum of the

renunciation or of an intention to do it, but it must be itself the record of the renunciation. I am not called upon to say whether the words, "the renunciation must be in writing," involves the signature; and I do not propose to say anything which would tend to shew it was my opinion that the renunciation in writing need not be signed. I see great danger in holding that the signature is not required. I leave the point wholly undetermined. This section, as has been properly pointed out, does not, in terms, say that the writing must be signed by the holder of the bill or note; and it does not, in terms, say that the writing may be signed by anybody on his behalf—that is, by an agent; and, no doubt, there are other sections where signature is spoken of, and it must be the signature of the person himself, or there may be cases where it is signed by the agent, and provisions are made to that effect in the statute.

But now I take the document which I have before me, and compare it with the statute. The facts are these. [His Lordship then stated the facts as to the writing of the memorandum by the nurse, and continued]: That memorandum was, no doubt, meant to be evidence of his intention. The document is signed by the nurse, and it was an authority to those concerned, if the note had been found, to destroy it in his lifetime.

But is that an absolute and unconditional renunciation in writing of the testator's rights on the note? Mr. Romer's argument (to put it shortly) was this, that it is final because it is stated it is Mr. George's dying wish, and that it is immediate because the note was to be destroyed as soon as found. But the real question, I think, is this: is the direction to destroy the note as soon as found an absolute and unconditional renunciation of the rights on the note? I put the proposition in that way; for I think it is the fairest way to state it in favour of the plaintiff. I am now assuming that this is a writing by the testator—an assumption that I am making in favour of the plaintiff.

The pertinent question is, could not the testator, after this paper had been signed by the nurse, have gone to the bank, if he recovered, where he supposed the note to be, to get it, or if it was found afterwards and brought to the testator, could he not say, "I have changed my mind"? I think he could. I think I am bound in point of law to say that he could.

Having examined the case with all the care that I think could be given to it, I am unable to come to the conclusion that this was an absolute and unconditional renunciation in writing such as is required by the statute.

Leask et al. v. Dew (1905), 92 N. Y. Supp. 891, 102 App. Div. 529.

Appeal from judgment on report of referee.

Action by George Leask and others, as executors of the estate of Oliver W. Buckingham, deceased, against J. Harvie Dew. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

This action was brought to recover upon a promissory note given by the defendant to the plaintiffs' testator. The note was dated November 23, 1901, whereby the defendant promised to pay to the order of Oliver W. Buckingham, the testator, one year after date, the sum of \$5,000, with interest at 6 per cent. Oliver W. Buckingham died testate on the 31st day of October, 1903, and upon the probate of his will the plaintiffs duly qualified as his executors. The answer averred, for separate and affirmative defenses, that the testator had canceled the said note by an instrument in writing, and that after the testator's death this defendant presented a claim against the estate of said deceased for \$31,500, which was disputed by the executors; that the matter in controversy was finally submitted to a referee, pursuant to the provisions of section 2718 of the Code of Civil Procedure, and upon the trial of said action the defendants therein offered said note in evidence by way of offset or counterclaim against the claim of this defendant, who was plaintiff therein; and that said action was pending and undetermined at the time of the joinder of issue. Upon the trial of this action the plaintiffs proved the making of the note, the non-payment of which was admitted, except as stated in the answer, and rested. The defendant then offered proof that after testator's death the note in question was found among his papers, inclosed in an envelope together with the following paper, all in the handwriting of the testator, except the signature of the witness:

"NEW YORK, Nov. 25, 1901.

"To my executors.

"*Gentlemen:* The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders.

"Truly yours,

"Witness:

OLIVER W. BUCKINGHAM."

"FRANK W. WOGLOM."

The defendant's wife testified that she was present at a time when the testator and her husband were talking about the note in question, and that her husband said to the testator that he objected to debt, and wished to pay the note, but Mr. Buckingham objected to receiving it, and said that he did not intend to take it, and wished it appropriated by Dr. Dew to fix the house, and he positively refused to take it. The counsel for the defendant asked the plaintiffs to concede that the note in question was offered as an offset upon the trial of the claim of Dew against the executors, whereupon the attorney for the plaintiffs said: "I concede that, prior to the commencement of this suit on the note for \$5,000, Dr. Dew, the defendant, presented a claim against the estate of Mr. Buckingham amounting to \$31,500, which, pursuant to the provisions of the Code, had been referred to Hon. Henry E. Howland, as referee, and that on the trial of said action before the said referee the executors introduced the same note which forms the subject of this action, and put the same in evidence, but did not assert the same as a counterclaim." The defendant's counsel then said: "I claim that the note could be used in evidence for no other purpose than as an offset or counterclaim." This is substantially all that was shown in regard to introducing the note in evidence as an offset in the other action. Both actions were tried before the same referee, who reported for the plaintiffs in the action at bar, and to his findings of fact and conclusions of law the defendant duly excepted. In the case of Dr. Dew's claim against the estate of Oliver W. Buckingham, the referee rendered a brief opinion, entitled in that case only, which closes as follows: "The note for \$5,000, dated November 23, 1901, made to the decedent by the claimant, is a valid and outstanding obligation (*Dimon v. Keery*, 54 App. Div. 318, 66 N. Y. Supp. 817), and the attempted renunciation was ineffectual." The referee wrote no other opinion in this case.

Argued before VAN BRUNT, P. J., and HATCH, O'BRIEN, INGRAHAM, and LAUGHLIN, JJ.

John M. Scribner, for appellant.

T. S. Ormiston, for respondents.

HATCH, J. The plea of tender is unavailing, as it was not made to appear that any money was produced at the time when the tender was claimed to have been made, or that any formal requisites were observed, sufficient to make a valid tender. It was said in *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362:

"A tender imports not only readiness and ability to perform,

but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be an existing capacity to perform."

The only thing disclosed by the evidence is that the testator did not intend to take the money, and it may be that from such situation, if it had been made to appear that the maker of the note had the ability to perform, it would constitute a waiver of the formal requisites; but there is no evidence to show that he either had the money at the time of the tender ready to pay, or that he had the means of producing it at the time. The tender of payment did not discharge the debt, and the mere expression by the testator that he desired the money to be used for other purposes, and did not intend to take it in discharge of the note, worked no estoppel upon him to subsequently change his mind and demand payment of it. Consequently the tender had no effect upon the note, and it remained a subsisting obligation.

So far as the plea of the discharge of the note by way of counterclaim to the defendant's claim made against the estate of the testator is concerned, it is sufficient to say that it was not used as a counterclaim in that proceeding, but simply as evidence in rebuttal of the defendant's claim. As such, it was competent for the purpose of showing an indebtedness of the defendant to the testator which might—dependent upon circumstances—tend to rebut the inference that there was a large indebtedness in favor of the defendant against the testator, as the former's liability upon the promissory note might be entirely inconsistent with the existence of a large claim in his favor against the testator. But whether it had great or little probative force is not of consequence, as it appears not to have been used as an offset or counterclaim to the defendant's demand, and consequently it was not discharged by any judgment or determination had in that proceeding.

This brings us to the main question in the case—the construction of the written declaration of the testator, which was found in the envelope which contained the note after his death. It is probably true that this declaration was sufficient to discharge defendant's obligation upon the promissory note, within the authority of *Wekett v. Raby*, 2 Brown's House of Lords, Rep. 386. The declaration therein was made a few days before the death of the testator, in these words:

"I have Raby's bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die he shall have it, he shall not be asked or troubled for it."

Suit having been brought upon the bond, it was ordered to be delivered up and canceled, and such decision was affirmed by the House of Lords upon appeal. The declaration in the present case is, in one view, stronger than the declaration in that case, for therein there was the express intention of the testator to keep the bond as a subsisting obligation against Raby, and it was not to be enforced save in the event of his death, when it was to take effect. In the writing under consideration in this case there is no such expression in terms. A similar doctrine was announced in *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 412. Therein the Raby Case is cited with approval. The declaration therein was, like the present, limited in its operative force to events which might happen subsequently to the death of the declarant. These cases applied the common-law rule, and, while they are authoritative declarations of the effect of this instrument at common law, they are not controlling in its construction at the present time, for the reason that the force and effect of an instrument of renunciation is now governed by the provisions of section 203 of the Negotiable Instruments Law (Laws 1897, p. 744, c. 612) It reads:

"The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon."

This statute was taken from an act passed by the British Parliament in 1882, known as the "Bills of Exchange Act." It has been quite generally adopted in various states of the American Union. Its provisions are as follows:

"(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor. (2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

It is readily seen that these two statutes, in character and import, are alike. The only difference is change in the form of phraseology, but it affects neither the sense nor the construction.

A single case has arisen in England under the provisions of this statute. *In re George*, L. R. 44 Ch. Div. 627, decided in 1890. Therein it appeared that the testator desired to have destroyed a note for £2,000 given by Mrs. Francis. Search was made for the same, that it might be destroyed, but it could not be found. At the instance of the decedent, the nurse in attendance upon him wrote at his dictation: "30th August, 1889. It is by Mr. George's dying wish that the cheque [*sic*] for £2,000 money lent to Mrs. Francis be destroyed as soon as found." The nurse added to this declaration the words: "Mr. George is perfectly conscious and in his sound mind. [Signed] Nurse T." This transaction took place two or three hours before death. The testator therein left a will, in which he bequeathed to Mrs. Francis, his neice, the sum of £6,000. The executors of the will declined to pay the bequest in full, and thereupon the legatee brought an action to determine the question as to whether the promissory note had been duly canceled. The court, under the provision of the statute above quoted, determined that the renunciation was insufficient to discharge the note. Upon the case there presented, I should be disposed to hold that it amounted, within the terms of the act, to an unconditional renunciation of the rights of the testator against the maker of the note. The expression that it was the testator's wish that it be destroyed would seem to constitute an announced declaration to destroy the instrument, and, as such, it was a clear expression of a renunciation of his right to enforce it. In the declaration of renunciation, it is stronger than the instrument relied upon in the present case.

There is some obscurity in the provisions of our statute. In its first sentence it provides for the renunciation of the rights of the holder against any party to the instrument which may be made before, at, or after its maturity. In the second sentence it provides for an absolute and unconditional renunciation of the rights of the holder against the principal debtor at or after the maturity of the instrument, and discharges the instrument. The first relates to the party; the second, to the instrument. It is somewhat difficult to see how there could be an absolute discharge of a party to an instrument without discharging the instrument as an obligation, so far as he is concerned. We do not clearly perceive why this distinction should have been made. It is immaterial, however, to the rights of the parties to the present action. The instrument of renunciation contains no express declaration of the testator to renounce his rights in the note against the party, or of his right to enforce it as a subsisting obligation.

The expression is: "I wish [the note] to be canceled in case of my death." There is nothing in these words which can be construed as expressing a renunciation of any rights either against the party or upon the instrument. Had it been delivered to the defendant during the lifetime of the testator, it would not have precluded the latter at any time upon maturity from enforcing the note. There is nothing indicating an intent upon his part not to enforce it during his lifetime. There was no delivery of it to anybody, and while, doubtless, it was sufficiently authenticated to accomplish a renunciation, it had no operative effect whatever, as it did not fall within the statute or comply with its terms.

In principle, the question raised by this case has been decided by this court. (*Dimon v. Keery*, 54 App. Div. 318, 66 N. Y. Supp. 817). Therein the plaintiff's intestate loaned to the defendant a sum of money, taking her promissory note in writing, wherein she agreed to pay the same, with interest, on demand. At the time the note was delivered, the testator indorsed thereon the words: "at my death the above note becomes null and void. Stephen C. Dimon." Dimon continued to retain possession of the note, and the defendant paid interest thereon, but no principal. Dimon died about three years after the execution and delivery of the note. In an action to enforce the same by his administrator, the defendant was held liable thereon, as the indorsement was a mere declaration by the payee of the note as to his intention concerning it, but that it was insufficient as constituting either a gift of money, or an agreement to discharge it as an obligation. The court therein did not discuss the statute which is here the subject of consideration. It is manifest, however, that the declaration indorsed upon the note was not a renunciation of the liability of the maker during the lifetime of the deceased, or of any renunciation of the obligation of the instrument; and, as it did not constitute a gift or an agreement, it neither fell within the terms of the statute, nor exempted the defendant, for either reason from liability thereon. In the instrument relied upon in this case, so far as the direction for cancellation in the event of death, and a command to his heirs to obey his wish and follow his orders, the language is no stronger than the indorsement upon the back of the note in the Dimon Case. Nor is it as strong, because the language there used was a declaration that the note at death "becomes null and void." Here there is simply the expression of a wish to have it canceled, and a direction to the heirs to obey the wish. Consequently the Dimon Case becomes a direct and controlling authority in the disposition of this controversy. As

there was no valid renunciation of right of the testator to enforce the note against the party, or of renunciation from liability upon the instrument, and as nothing contained in the declaration otherwise operates to relieve the defendant from liability, it follows that the note remains a valid and subsisting obligation.

The judgment enforcing it should therefore be affirmed, with costs.

All concur.

EFFECT OF ALTERATION.

§ 126.

Simpson v. Stackhouse (1848), 9 Pa. St. 186, 49 Am. Dec. 554.

In error from the District Court of Allegheny.

This was an action against an endorser of a note drawn by Sankey, who resided in Mercer county. It was proved that the body of the instrument was in the handwriting of defendant; but that the words "payable at the bank of Pittsburgh," written at the end of the instrument, were in a different handwriting.

The defendant's point was, that it was incumbent on the plaintiff to show these were written at the time of the endorsement, or with defendant's consent.

The court said the jury must decide this as a matter of fact.

Shaler and Stanton, for plaintiff in error.

Metcalf, contra.

GIBSON, C. J.—As a general rule the law presumes, in favour of innocence, that an alteration in an instrument is a legitimate part of it, till the contrary appears; but it is not extended to negotiable securities. The principle of the English cases is, that an alteration so far apparent on the face of a bill or note as to raise a suspicion of its purity, makes it incumbent on the plaintiff to prove that it is still available, and that it is not incumbent on the defendant to disprove it. *Johnson v. The Duke of Marlborough*, 2 Stark. Rep. 313; *Henman v. Dickinson*, 5 Bing. 183; *Bishop v. Chambre*, 3 C. & P. 53; and *Leykarriff v. Ashford*, 12 Moore, 281, establish that the general presumption of innocence in such a case is overborne by the nature of the instrument. It was doubted by the learned commentators on Mr. Phillips's Treatise on the Law of Evidence, vol. 2, p. 229, whether the principle of the English decisions would be adopted by the American courts. The later decisions in the United States are discrepant, but their pre-

ponderance is in favour of restraining the general rule to deeds and writings not negotiable. In *McMicken v. Beauchamp*, 2 Miller's Louis. Rep. 290, it was ruled that interlineations in a material part of an acceptance are presumed to have been forged, till the contrary is shown; in *Hills v. Barnes*, 11 N. H. Rep. 395, that an unexplained alteration of a promissory note, apparent on the face of it, is presumed to have been made after execution and delivery; in the *Commercial and R. R. Bank v. Lum*, 7 Howard's Miss. Rep. 414, that an alteration on the face of a promissory note must be shown by the holder to have been innocently made; and in *Warren v. Layton*, 3 Harring. 404, that a party cannot recover on an altered note without explanatory proof. So far the American cases are consistent. But, on the other hand, it was ruled in *Gooch v. Bryant*, 1 Shep. 386, that an alteration of a figure in the date of a note, proved to be such by inspection, is not evidence of itself that it was made after execution and delivery; in *Crabtree v. Clark*, 7 Shep. 337, that it is for the jury to determine—by inspection, I suppose—whether an unexplained alteration, apparent by inspection, was made before or after execution; and in *Davis v. Carlisle*, 6 Ala. Rep. 707, that if it cannot be shown by whom a note has been altered, the court cannot presume it to have been altered by the holder, but the jury may. There are two indecisive cases. In delivering the opinion of the Supreme Court of New Jersey, in *Sayre v. Brookfield's Administrators*, 2 South. 737, Mr. Justice Southard, neither admitting nor denying the principle of the English decisions, thought that the insignificance of the alteration in that case, which made a difference in the interest of only a few cents, was sufficient to show the integrity of the transaction. In the other case, *Runnion v. Crane*, 4 Blackf. 466, a jury of inquiry were allowed to disregard an unexplained alteration of a note, doubtless because they could not go behind the interlocutory judgment. The decision is authority for nothing. But how stands the question on principle? The English decisions are founded in reason, and not in considerations growing out of the stamp acts. He who takes a blemished bill or note, takes it with its imperfections on its head. He becomes sponsor for them, and though he may act honestly, he acts negligently. But the law presumes against negligence as a *degré* of culpability; and it presumes that he had not only satisfied himself of the innocence of the transaction, but that he had provided himself with the proofs of it to meet a scrutiny he had reason to expect. It is of no little weight, too, that the altered instrument is found in his hands, and that no person else can be called on to speak of it; for

without a presumption to sustain him, the maker would in every case be defenceless. It may be said that the holder, with such a presumption against him, would also be defenceless. But it was his fault to take such a note. As notes and bills are intended for negotiation, and as payees do not usually receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands till it is repelled; and a holder ought, therefore, to explain why he took it branded with marks of suspicion which would probably render it unfit for his purposes. The very fact that he received it, is presumptive evidence that it was unaltered at the time; and to say the least, his folly or his knavery raised a suspicion which he ought to remove. The maker of a note cannot be expected to account for what may have happened to it after it left his hands; but a payee or endorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it. Now, it is agreed that the note before us was drawn and endorsed for the accommodation of the maker who negotiated it, and who consequently stands as if it had been drawn by the endorsee and endorsed by himself, as it might just as well have been, the difference being in the plan of the security and not in its effect. It was distinctly proved that the body of the note is in the handwriting of the defendant, and that the words "payable at the Bank of Pittsburgh," are not. The difference in the character of the writing is obvious; and the additional words are broken into two half lines, for to have comprised them in one would have required it to be run through the signature, and they were necessarily crowded into the left hand corner, at the bottom of the paper. That is certainly not the ordinary collocation of the lines of a commercial instrument. Mr. Chitty says in his *Treatise on Bills*, p. 213, that a drawee ought not to accept a bill which has the *least appearance* of alteration; and it was not disputed at the trial that this note had that appearance, or that the alteration was in a material part of it, its effect being to dispense with personal notice of dishonour. The question was on the *onus*, and the defendant prayed instruction that the body of the note being in his handwriting, and the questionable words being in a different hand, it was incumbent on the plaintiff to show that they were in the instrument at the time of endorsement, or with the defendant's consent: to which the court responded that the jury must decide as a matter of fact. The response was a refusal of the prayer, and a denial that there was any presumption to lead to a particular conclusion. There was no direct evidence on the subject; the

deposition of Sankey, the drawer, who had given credit to the note by his name, having been properly ruled out; but on the principle of the English cases, and a majority of our own, the defendant's prayer ought to have been granted

Judgment reversed, and a venire facias de novo awarded.

Moskowitz v. Deutsch et al. (1905), 92 N. Y. Supp. 721.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Max Moskowitz against Isidor Deutsch and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before SCOTT, O'GORMAN, and BLANCHARD, JJ.

Fried & Friedman, for appellants.

H. M. Wald, for respondent.

O'GORMAN, J.—The defendants made a check to one Goldberg under date of September 2d. On the following day the payee represented to the defendants that he had lost this check, whereupon payment thereof was stopped at the bank, and five or six days later he received from the defendants another check for the same amount, which was duly cashed. A day or two after September 12th, the original check of September 2d with a "1" inserted before the "2," making the date September "12," was indorsed over to the plaintiff by Goldberg, and cashed. The plaintiff now sues the drawers, and the defense is a general denial and forgery. That the date of this check had been altered by Goldberg, or at his instance, is too clear for dispute. Such an alteration is material, constitutes forgery, and destroys the validity of the check, except as provided by section 205 of the Negotiable Instruments Law (Laws 1897, p. 745, c. 612), which declares that, "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." If it be assumed, therefore, as the court below has found, that the plaintiff is an innocent holder for value in due course, he may assert such rights as are conferred by the check as it was before the alteration. We then have a case where a check dated September 2d is cashed by the plaintiff and presented for payment more than 10 days thereafter. As all the parties resided, and the

bank was situated, in the city of New York, the delay in the presentment of the check was unreasonable, and was sufficient to discharge the defendants as drawers from liability thereon to the extent of the loss, if any, incurred by them in consequence of the delay. But the only way in which a drawer of a check can be exposed to injury by such delay is where the bank becomes insolvent subsequent to the delivery of the check and prior to its presentment. (Eaton & Gilbert on Commercial Paper, 630, and cases cited; *Andrus v. Bradley* [C. C.] 102 Fed. 54, affirmed 107 Fed. 196, 46 C. C. A. 238, 53 L. R. A. 432). The loss suffered by the defendants must be attributed not to delay in the presentment of the check, but to their imprudent reliance on the false and fraudulent representations of the payee. Before giving the new check, the defendants might have insisted upon full indemnity from Goldberg, and thus escaped the loss of which they now complain. By their conduct, Goldberg found it possible to perpetrate a fraud, and the consequences of their misplaced confidence in him should be borne by them, and not visited upon the plaintiff, an innocent party to the transaction. Upon the facts, the plaintiff was entitled to judgment.

Judgment affirmed, with costs.

All concur.

Porter v. Hardy. (See page 549.)

TITLE V.

CONFLICT OF LAWS.

WHAT LAW GOVERNS THE CONTRACT.—IN GENERAL.

Hamlyn & Co. v. Talisker Distillery Co. et al. (1894) (House of Lords), L. R. 19, App. Cas. 202.

The facts appear from the opinion.

LORD HERSCHELL, L.C.—My Lords, on the 27th of January, 1892, an agreement was entered into between Roderick Kemp & Co. of the Talisker Distillery, Carbost, Isle of Skye, and Hamlyn & Co. of London, under which Hamlyn & Co. were to supply to the distillery a patent drying machine which was to be worked by the distillery company, who were to bag up and deliver to Hamlyn & Co. dried grain free on board at Carbost to their order or otherwise as required. The agreement concludes with a clause in the following terms: "Should any dispute arise out of this contract the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." This agreement was made between the parties in England.

Shortly after the contract was entered into Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp & Co., and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had "no jurisdiction," and that "the action is excluded by the clause of reference in the memorandum of agreement." These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by Lord Adam and Lord M'Laren, in the Inner House, Lord Kinnear dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents.

It is not in controversy that the arbitration clause is, according to the law of England, a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the court below is thus expressed by Lord

Adam: "So far as I see, nothing required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *lex loci solutionis*, that is, by the law of Scotland."

It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the *lex loci solutionis*. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

The learned judges in the court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be

looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.

Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

But then it is said that the Scotch Court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted the courts in Scotland cannot be bound to enforce a contract which is against the policy of their law. I should be prepared to admit that an agreement which was opposed to a fundamental principle of the law of Scotland founded on considerations of public policy could not be relied upon and insisted upon in the courts of Scotland; and if according to the law of Scotland the courts were allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which was urged by the respondents. But that is not the case. The courts in Scotland recognise the right of the

parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the courts in Scotland would have recognised and given effect to and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy the rule can be said to rest that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced.

It is not necessary to inquire into the history of the distinction which has arisen in the courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is sufficient to say that when once it is admitted, as it must be, that the courts of Scotland do enforce and give effect to an arbitration clause, and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that if this arbitration clause is to be interpreted according to the law of England, and is therefore a valid arbitration clause, there is no reason why the courts in Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland.

But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where the merits fall to be determined in the Scotch courts, insist, by virtue of an agreement, that those courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light,

I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail. For these reasons I move that the judgment appealed from be reversed.

*So ordered. The cause remitted * * * in order that the matters in dispute may be settled by arbitration in terms of the contract.*

(The concurring opinions of Lord Watson and Lord Ashbourne omitted).

WHAT LAW GOVERNS CONTRACT OF MAKER OR ACCEPTOR.

Woodruff et al. v. Hill et al. (1874), 116 Mass. 310.

Contract upon a promissory note for \$1352.70. At the trial in the Superior Court, before PUTNAM, J., the plaintiffs offered evidence tending to prove that the defendants made the note, and that the payees indorsed it before maturity to the plaintiffs, who paid to the payees at the time of the indorsement, and as the consideration therefor, \$699.48 in cash, and credited the payees with \$629.55, in payment of a preëxisting debt due from them to the plaintiffs, the balance of said note amounting to \$23.67, being charged and allowed for interest. The payees of the note and the plaintiffs are residents of New York, and the indorsement was made in that state. The defendants are residents of Boston, in this Commonwealth, and the note was made and was payable in Boston.

The defendants offered to prove that by the law of New York the plaintiffs, upon the above evidence, were not *bona fide* holders for value except as to the amount of the money paid by them to the payees at the time of the indorsement; that the note was given by them without consideration to the payees, they agreeing not to use the same except as collateral to their own note, to raise money upon; and that, as between them and the payees, the transfer of the note to the plaintiffs was fraudulent. The defendants did not contend that the plaintiffs had any knowledge of the want of consideration of the note, or of the purpose for which it was given.

The judge ruled that the facts offered by the defendants would not, if proved, constitute a defense, and that the law of this Commonwealth and not the law of New York governed, and

instructed the jury to return a verdict for the plaintiffs for the whole amount of the note. The defendants alleged exceptions.

A. A. Ranney, for the defendants.

H. J. Boardman & C. Blodgett, for the plaintiffs.

GRAY, C. J.—The note was made in Massachusetts, and the contract of the makers with the payees and with any indorsee thereof was to be performed here, and governed by our law. (Story Conf. Laws, §§ 317, 344, 345). By that law, the facts offered to be proved at the trial constituted no defence. (*Blanchard v. Stevens*, 3 Cush. 162).

Exceptions overruled.

Phipps et al. v. Harding (1895), 17 C. C. A. 203; 70 Fed. 468.

In error to the Circuit Court of the United States for the Western District of Wisconsin.

This suit was brought to recover the amount of a promissory note executed by the Hudson Furniture Company (a corporation of the state of Wisconsin), dated Hudson, Wis., March 26, 1892, payable April 14, 1893, to the order of Edgar Harding, the defendant in error, for the sum of \$5,000, payable at the North National Bank, Boston, Mass. Prior to its delivery or acceptance, the plaintiffs in error severally signed their names upon the back thereof for the purpose of giving credit to such note with the payee. It was thereupon sent by mail from Hudson, Wis., to the payee, at his residence in the state of Massachusetts, with the request that he would accept it in lieu of and in extension of a note of the Hudson Furniture Company for a like amount then held by him, and maturing at or about the date of the new note. It was received by the payee in the state of Massachusetts, and there accepted by him for the prior obligation of the company, upon the faith and security of the individual names upon the paper. The note was not paid at maturity. It was not properly protested for non-payment, nor were the plaintiffs in error seasonably notified of its presentment and non-payment. At the time of its execution and delivery, the Hudson Furniture Company was insolvent, to the knowledge of the plaintiffs in error, who were directors of the company, constituting the majority of its board of directors at the time of its execution, and so continued down to and after maturity of the note.

By the statute of Massachusetts (St. 1874, c. 404) it is

enacted that "all persons becoming parties to promissory notes payable on time, by signature on the back thereof, shall be entitled to notice of the non-payment thereof the same as endorsers."

The case was tried in the court below, without the intervention of a jury. The court found the facts as above stated, and, as conclusion of law upon such facts, held that the several individual defendants (plaintiffs in error here) were "joint and several makers of said note, and therefore not entitled to protest of said note," and judgment was rendered against all the defendants for the amount due upon the note.

It is assigned for error that the court erred in the following respects: (1) In the finding and decision of the said circuit court that at the time of the execution and delivery of the note upon which this action was brought to the plaintiff, the defendant, the Hudson Furniture Company, was insolvent; (2) in that the said court also found and decided that such insolvency was known by the defendants, Phipps, Coon, Jones, and Goss; (3) in the finding and decision of the said court that the said Phipps, Coon, Jones, and Goss signed the said note; (4) in the finding and decision of said court that said Phipps, Coon, Jones, and Goss were not entitled to protest of said note; (5) in the finding and decision that plaintiff recover from the defendants above named the amount due on said note, with interest and costs; (6) in the finding and decision of said court by which judgment is ordered according to the findings.

Charles P. Spooner and James P. Kerr, for plaintiffs in error.
M. H. Houtelle, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

We are not at liberty to review the evidence to ascertain whether the finding of the court below upon the facts was warranted by the testimony. We are restricted to the consideration of the question whether the facts as found support the judgment rendered. (*Jenks' Adm'r v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641). We must therefore consider the case upon the assumption that, at the time of the execution of the note, the Hudson Furniture Company was insolvent, to the knowledge of the individual parties to the note, who were its directors. * * *

It is settled doctrine that the federal courts, in the exercise of their co-ordinate jurisdiction, are not bound by the decisions of

the state courts upon subjects of general law, but are at liberty to follow the convictions of their own judgment. (*Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425; *Railway Co. v. Prentice*, 147 U. S. 106, 13 Sup. Ct. 261). Therefore, notwithstanding it has been held by the supreme court of the state in which this note was executed that parties standing in like relation to bills and notes with the plaintiffs in error here are to be treated as indorsers (*Blakeslee v. Hewitt*, 76 Wis. 341, 44 N. W. 1105), the supreme court of the United States, in *Good v. Martin*, 95 U. S. 90, and *Bendey v. Townsend*, 109 U. S. 665, 667, 3 Sup. Ct. 482, has determined that they must be treated as joint makers of the note with the party who appears thereon as maker. And such is also the law of Massachusetts. (*Bank v. Willis*, 8 Metc. [Mass.] 504; *Brown v. Butler*, 99 Mass. 179; *Way v. Butterworth*, 108 Mass. 509; *Allen v. Brown*, 124 Mass. 77). We are therefore constrained to hold that the plaintiffs in error were joint makers with the Hudson Furniture Company of this note, and, if the contract is to be controlled by the law of the state of Wisconsin, were not entitled to notice of protest. Being joint makers of the note, their liability is controlled by the law of the place where the contract is payable, because they are deemed to have reference to the law of such place in the construction of the obligation assumed. (*Brabston v. Gibson*, 9 How. 263, 277; *Supervisors v. Galbraith*, 99 U. S. 214, 218; *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418; 1 Daniel, Neg. Inst. [4th Ed.], § 895). It would be otherwise with respect to the indorser of a note, for he is treated as in fact entering into a new obligation, undertaking that the maker will pay at the time and place stipulated, and that he (the indorser) will respond to his obligation at the place of the execution of his indorsement, if there delivered, in the event of dishonor and notice. If delivered at a place other than at the place of execution, the law of the place where delivered controls. (Daniel, Neg. Inst., §§ 868, 899; *Slacum v. Pomeroy*, 6 Cranch, 221; *Musson v. Lake*, 4 How. 262). The plaintiffs in error thus being joint makers of a note payable and delivered in the state of Massachusetts, their obligation is to be judged by the law of that state.

We are therefore brought to the inquiry whether the statute of that state to which reference has been made is operative to clothe the joint makers with the rights to notice of protest that an indorser is entitled to. This statute manifestly regard all

parties to a note by signature on the back thereof, whether they were to be treated as guarantors or as joint makers, in the light of sureties for the maker, and recognizes the equitable right of such parties to notice and dishonor of the note by their principal. It sought to place them, with respect to presentment, demand, and notice of dishonor, upon the same footing with an indorser. The statute was thus construed by the supreme judicial court of that commonwealth in *Bank v. Law*, 127 Mass. 72, prior to the execution of the contract in question. We are, of course, bound by that construction. (*Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348; *Baltimore Traction Co. v. Baltimore Belt R. Co.*, 151 U. S. 137, 14 Sup. Ct. 294). So that, assuming the validity of that statute, any one becoming a party to a note payable on time by signature on the back thereof, whether he be treated as guarantor or joint maker, is in fact a mere surety for the maker; his liability is conditional and secondary; and before he can be charged, he must have the same notice of protest that an indorser by the law merchant would be entitled to under like circumstances. He stands in this respect in the shoes of an indorser. The statute entered into and is a term of the contract. The engagement of the plaintiffs in error, therefore, was that if, upon due demand, the note should not be paid according to its tenor, they would compensate the holder or a subsequent indorser who was compelled to pay, provided the requisite proceedings on dishonor were duly taken.

It is urged, however, that we must disregard this statute; and, in support of this contention, the broad doctrine is asserted that the several states of this Union have no right by statute to change the general commercial law. This contention is rested upon certain observations of justices delivering the opinions of the court in *Swift v. Tyson*, 16 Pet. 1, 18, and *Watson v. Tarpley*, 18 How. 517, 521. * * * * *

It may not be denied that the language employed gives color of authority to the pretension. * * * * *

The observations referred to in both the cases were certainly obiter so far as they seem to imply or can be properly construed as holding that a state is without power with respect to contracts made within its jurisdiction, and controlled by its law. In view of the eminent learning of the distinguished jurists referred to, their observations are to be treated with great deference; but, if susceptible of the meaning contended for, they cannot be held to declare the settled law of the land without determination of the question by the supreme court in a cause wherein the question was involved and necessary to be decided.

There are a number of decisions of the supreme court which distinctly recognize the right of such legislation by the state.

* * * * *

The contention that this statute of Massachusetts is invalid and inoperative goes to the extent of depriving a state of power to legislate with respect to the law merchant. It presents a bold and far-reaching proposition, striking at the root of power in the respective states to which we are not prepared to yield assent. We are referred to no provision of the constitution which expressly or impliedly inhibits the exercise of such power by the state. The contention assumes that there is a commercial law of the United States distinct from and independent of the law of the states. Whence came it, and how was it adopted? Was it the common law of England or the civil law of continental Europe? Was it a law appropriated by the nation upon the adoption of the constitution? It must then be universal in its application throughout the nation, overriding all state laws upon the subject and all right of the states to legislate. We know that most of the states are governed by the common law of England as modified and adapted to the peculiar circumstances and conditions of each, and that one state, at least, is governed by the civil law. And we know, moreover, that the commercial law existing in these various states, while alike with regard to underlying principles, is widely different in many essential respects. There is no common law of the United States, except possibly as the common law of England has been adopted with reference to the construction of powers granted to the federal Union. * * * * *

Mr. Daniel, in his valuable treatise upon the law of Negotiable Instruments (sections 863 and 864), defines the principle which should rule the question in the following explicit language:

"Each one of the United States is, in contemplation of its own and of the federal constitution, a distinct and independent sovereignty, with its own peculiar code of laws and systems of judicature. And while, in the aggregate, they compose one integral confederacy, which is itself an independent nation, paramount in certain respects to the states, in all other respects the states retain their separate autonomies, and are deemed as much foreign to each other as if not in any wise associated together. The regulation of contracts comes peculiarly within the province of the states, and therefore contracts between citizens of the different states, while they may be enforced by process in the federal courts, nevertheless are to be construed and effectuated, not by a general system of laws which overspread the whole country,

but in accordance with the principles of international law which govern transactions between parties of different nations.

"Sec. 864. As long as all the parties to a bill or note are confined within the limits of a single state, the local law alone determines their rights and liabilities. No suit can be brought in a federal court, and any question which may be litigated begins and ends with the local tribunals. But the vast and constant traffic between the states, and the general use of bills and notes as a medium of exchange, gives circulation to those instruments from hand to hand, and from state to state; and questions of nicety are often presented in the inquiry by what law the rights and liabilities of the parties are to be ascertained. In some of the states, as in Maryland, the English statute of 3 & 4 Anne is in force. In others, as in Virginia, where none but notes payable at bank are negotiable, there are peculiar statutory provisions respecting commercial paper. In all of the states each recognizes the precedents of its own courts, as independently of the rulings of the supreme court of the United States as of those of Great Britain, which may, indeed, shed great light on all commercial questions, but are of no binding authority. When suit is brought in one of the federal courts, it, on the other hand, will be guided by the general law merchant in questions referable to it, and will follow its own views about it, unless the nature of the liability contracted has already been determined, in the particular state of the contract, at the time it was entered into."

We are of opinion that these principles are not shaken by the obiter dicta to which reference has been made. It will thus be seen that, in the exercise of the concurrent jurisdiction of the federal court with respect to all contracts not within the exclusive control of the federal government, we administer the law of the state which controls the contract, and that each state has the right to impose such conditions and limitations upon contracts, not inhibited by the terms of its own or the federal constitution, as it may see proper. It is, of course, most desirable that there should be uniformity of laws with respect to commercial paper,—a necessity becoming more and more emphasized day by day, and which may possibly result in the grant of exclusive control of the subject to the federal government. It is not, however, within our provinces to bring about such a result, however desirable. We are constrained to hold that the act of Massachusetts here in question was a valid exercise of power, and became a term of this contract. The nature of the liability at the time of the making of the contract was declared by the statute law of the state of the

contract, and we must construe the contract in the light of such statute law.

We are thus brought to the question whether the known insolvency of the maker at the time of the execution of the note, and the fact that the plaintiffs in error were directors, constituting a majority of the board of directors, of the maker of the note, obviate the necessity of presentment of the note for payment, and the giving of seasonable notice of dishonor. The contract of the parties was conditional. It was, as we have seen, that if, upon due demand, the note should not be paid by the corporation according to its tenor, they would compensate the holder, or a subsequent indorser who is compelled to pay, provided the requisite proceedings for dishonor were duly taken. That there should be demand of payment and notice of dishonor were terms incorporated into this contract. (*Rothschild v. Currie*, 1 Adol. & E. [N. S.] 43). The reason of the condition imposed by the law, doubtless, was that the indorser might take prompt measures for his security, and the law presumed injury from want of notice of dishonor. This presumption is certainly not refuted by proof of the solvency of the maker evidencing that no injury resulted from want of notice to the indorser. It is said, however, that insolvency known to the indorser dispenses with the necessity of notice, because nothing could be lost by default of demand and notice. We are not prepared to concur in the conclusion of fact. We have said that the solvency of the maker, when no possible loss could result to the indorser from want of notice, will not excuse failure to advise of dishonor. Certainly, in the case of insolvency notice is more essential, that the party to be charged may take prompt measures for his security. The insolvency of the maker might possibly affect the sufficiency of indemnity, but it would not necessarily result in a total failure of redress. That would be dependent upon the extent of the insolvency. There have been cases, invested with peculiar equities, in which courts have sought to evade this wholesome rule of the common law, and in which they have permitted evidence of no injury to excuse notice. We are not prepared to follow a rule that will tend to confusion in commercial law in order to relieve a supposed hardship. We concur with the supreme court of Massachusetts in *Farnam v. Fowle*, 12 Mass. 89, 92, that "the hardship, if any, arises from a fluctuation of opinion and an uncertainty as to rules, and seldom from an inflexible adherence to them, because, when it is once known that exactness in the performance of duty is to be required, parties will adapt themselves to such a state of things,

and be always diligent and punctual to avail themselves of their contracts." And we concur with Mr. Daniel (Daniel, Neg. Inst., § 1134) that it is "a total misconception of the obligation of an indorser to place his liability at all upon any question involving the pecuniary circumstances of his principal." Hardship is more likely to happen from speculation of courts and juries in the determination of the question of fact whether injury has or not resulted from want of notice than from strict adherence to the law and to the terms of the contract. The better opinion is, and, as we think, the settled doctrine of this country is, that insolvency is no excuse for failure of notice of dishonor. (*French's Ex'x v. Bank*, 4 Cranch, 141; *Wilson v. Senier*, 14 Wis. 380; *Sanford v. Dillaway*, 10 Mass. 52; *Farnam v. Fowle*, 12 Mass. 89; *Bank v. Ayers*, 16 Pick. 392; *Bank v. Spencer*, 6 Metc. [Mass.] 308).

Nor do we think that the fact that the plaintiffs in error were directors and constituted a majority of the board of directors of the maker of the note is matter of moment or excuses failure of notice. * * * * *

It seems a curious conclusion that, because the note is indorsed by a majority of the board of directors, therefore the individual liability of each is fixed, and want of notice of dishonor excused, upon the ground that they should act together as a majority, and so could appropriate funds of the corporation to the payment of the note. The argument assumes that they must act together as a majority of the board of directors; that there are funds of the corporation which should have been applied to the payment of the note, and were not applied, because of the non-action by the indorsers. The argument concedes that, if the note were indorsed by a minority of the directors, failure to give notice would not be excused. But by what right does the court assume that the majority of the directors indorsing the note will or should act together as a majority in the board upon any question affecting the interests of the company? The argument proceeds upon the theory that they should act in their own interest to protect their liability, and possibly in opposition to the interests of creditors. We think the case is founded upon a mistaken notion of the duties and obligations of directors. They are only to administer the property of the corporation as they find it. They are not obliged to furnish funds for the use of their principal, nor ought they, as directors, to protect their individual interests against the interests of their principal. It is, moreover, to be observed that, in the case we have now in hand, the body of the stockholders, some two months prior to the maturity of this note,

directed the officers of the company to wind up the affairs of the company at the earliest date practicable, to collect all its assets, sell all its property, and apply the proceeds to the payment of the debts of the company. The corporation then ceased to be a going concern. * * * * *

It would have been a violation of duty for the plaintiffs in error, as directors of the company, after this resolution of the stockholders to have sought to apply the assets of the corporation to the payment of this particular debt for which they were conditionally liable, and thus to relieve themselves of liability, to the detriment of the general creditors of the company. Their duty was to refrain from applying the assets of the corporation to the payment of this note if the assets of the corporation were insufficient to pay all debts in full. Their power by the resolution became limited, and their duty was to marshal all the assets of the corporation, and apportion them ratably among all the creditors of the corporation according to their equality of right. They could not legally have done that which the supreme court of Georgia, in the case referred to, holds that they should have done, and failure so to do wrought legal excuse for failure of duty on the part of the holder of the note. In this respect this case is distinguishable from the case of *Hull v. Myers*.

The court below held that the plaintiffs in error were joint makers of the note, and therefore not entitled to notice of protest. We have seen that, by the law of Massachusetts which governs this contract, they were entitled to notice, notwithstanding that relation to the paper. We hold that failure of notice is not excused by anything apparent on the record, and that the plaintiffs in error are discharged from liability upon the paper by reason of failure of proper demand and of seasonable notice of dishonor.

The judgment will be reversed, and the cause remanded, with directions to the court below to render judgment for the plaintiffs in error upon the findings.

*The Junction Railroad Company v. The Bank of Ashland (1870),
12 Wall. (79 U. S.) 226.*

Error to the Circuit Court for the District of Indiana.

This was an action of debt brought by the Bank of Ashland, a corporation of Kentucky, against the Junction Railroad Company, a corporation of Indiana, to recover the amount of nine

bonds of the latter company for one thousand dollars each, with interest coupons attached. The bonds bore date the 1st day of July, 1853, and were payable to Caleb Jones, or bearer, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, on the 1st day of July, 1863, with interest at the rate of ten per cent per annum, payable half-yearly. The declaration contained twenty special counts on the bonds and coupons, and one common count for money lent, paid, had and received, and account stated. To the last count there was a plea of *nil debet*, and to the twenty special counts the defendant filed four special pleas, the substance of which was that the bonds were obtained by the plaintiff from the Ohio Life Insurance and Trust Company, and that they were originally negotiated by the defendant to that company in Cincinnati at par, under the pretence of a sale of the bonds, but, in truth, by way of a loan of money from the Ohio Trust Company to the defendant, upon interest at the rate of ten per cent per annum—a rate which, as stated in the first special plea, the Ohio Company, by its charter, was prohibited from taking, and which, as stated in the second of said pleas, the defendant, by the law which authorized it to do business in Ohio, was prohibited from paying; and which, as stated in the third plea, was forbidden by the usury laws of New York, where the bonds were made payable. The pleas alleged that the plaintiff took the bonds with notice of the usurious consideration. These pleas being demurred to and overruled, the defendant filed a fourth special plea to the same counts, setting forth substantially the same facts as in the first plea, with a more specific averment of a corrupt and usurious agreement. To this plea the plaintiff replied that the bonds were purchased from the defendant by the Ohio Life and Trust Company in good faith, and that the plaintiff received them in good faith, with the assurance and belief that they had been so purchased and had not been received as security for a loan.

A jury being waived, the cause was tried by the court, which made a special finding of the facts; the substance of which was, that the bonds declared on were, as alleged in the pleas, originally negotiated by the defendant below to the Ohio Life Insurance and Trust Company, at its office in Cincinnati, Ohio, at par, being parcel of one hundred and twenty-five bonds negotiated together; that the defendant proposed to sell the bonds to the Trust Company, but the latter refused to take them unless some persons other than the defendant would guaranty their payment, which was done; whereupon the negotiation was consummated; that

said negotiation did not amount to a loan of money, but to a sale of the bonds, and that the transaction involved nothing usurious; that in 1857 the Trust Company transferred the bonds to the plaintiff below in payment of a debt; and that the plaintiff took them in good faith, without any notice of the fact of usury or of illegality in the issuing of the bonds, but had notice of the guaranty. Upon these facts the court below gave the plaintiff judgment for the full amount of the bonds and interest; and the defendant brought the case here.

To enable the reader the better to judge at this point of the case, whether the judgment below was rightly or not rightly given, it should be mentioned, that in New York by a statute enacted April 6th, 1850, a defense of usury cannot be set up by corporations; that by a supplement to its character, dated January 29th, 1851, the Junction Railroad Company was empowered to borrow money or sell its securities at any rate of interest; and that by statute of Ohio, passed December 15th, 1852, any railroad company authorized to borrow money and issue bonds for it, may sell its bonds when, where, and at such rate and price as the directors deem most advantageous to the road; and finally, that by a second statute of the same state, the Junction Railroad Company was made a corporation of Ohio, and authorized to perform any act as if originally incorporated therein.

Messrs. C. P. James, Rufus King, and S. J. Thompson, for the plaintiffs in error.

Messrs. A. G. Porter and W. H. Wadsworth, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Unless this case has become embarrassed by the pleadings, the facts as found by the court present a clear case in favor of the plaintiff. If they could have been given in evidence under the common count, we should have felt no hesitation in sustaining the judgment on that count alone, disregarding the special counts and the pleadings thereto. But it has been held that an agreement under seal for the payment of money cannot be received to support the common money counts. It will be necessary, therefore, to examine the case with reference to the defences set up in the special pleas. In all of them usury and want of authority in the original parties to make the negotiation are the points of defence relied on.

With regard to the question what law is to decide whether a contract is, or is not, usurious, the general rule is the law of the place where the money is made payable; although it is also held

that the parties *may* stipulate in accordance with the law of the place where the contract is made. In this case it is conceded by all the pleas, and shown by the special finding of the court, that the place of payment of the bonds in question was the city of New York. By the law of that state, passed April 6th, 1850 (of which the Circuit Court had a right to take judicial notice), (*Owings v. Hall*, 9 Peters, 625), no corporation is allowed to interpose the defence of usury. None of the special pleas allege that the place of payment mentioned in the bonds was adopted as a shift or device to avoid the statute of usury. The device complained of was a pretended sale of the bonds, when the transaction was really a loan. Admitting that it was a loan, it is not denied that it was made *bona fide* payable in New York. Hence the pleas cannot stand as pleas of usury, properly so called. They must stand, if at all, on the allegation that one or both of the contracting parties was prohibited by law from making such a contract.

It is certain, however, that no such prohibition exists in the case of the defendant. By the supplement to its charter, passed by the legislature of Indiana January 29th, 1851, it was authorized to borrow money or sell its securities at any rate of interest or price it might deem proper. The courts in Indiana are authorized by the constitution of that state to take judicial notice of all its laws; and, therefore, the Circuit Court could take judicial notice of this law. By the law of Ohio, passed December 15th, 1852, any railroad company authorized to borrow money, and to execute bonds or promissory notes therefor, was authorized to sell such bonds or notes at such times and in such places, either within or without the State, and at such rates, and for such prices, as in the opinion of the directors might best advance the interests of the company. This is tantamount to a repeal of the usury laws as to such companies. And although this law had primary reference to the railroad companies of Ohio, yet the Supreme Court of that State, in a very sensible and judicious opinion, has decided that it extends by comity to railroad companies of other States borrowing money in Ohio. Indeed, the second special plea sets forth a statute of Ohio, in relation to this very defendant, which makes it a corporation of Ohio, as well as Indiana, and authorizes it to perform any act within the State of Ohio the same as if it had been originally incorporated therein. This act, it seems to us, rendered the exercise of comity hardly necessary to bring the defendant within the privileges of the Ohio act of 1852.

It must be conceded, therefore, *first*, that the transaction in question, if a loan at all, was not a usurious loan by the law of

the place which governed the contract; and, *secondly*, that the defendant had a perfect right to make it. This observation is applicable to all the special pleas, and disposes entirely of the second of them, in which the defendant relies on its own disability to borrow money at a higher rate of interest than seven per cent; and also disposes of the third of said pleas, in which the statute of usury of the State of New York is pleaded. There remains, then, only the first plea, in which the point is taken that the Ohio Life Insurance and Trust Company was, by its charter, prohibited from *taking* more than seven per cent interest. This point is fully presented in the last plea on which issue was taken, and the defendant can, therefore, receive no harm, though the demurrer to its first plea was wrongly sustained. It still had the benefit of that defence under the last plea; and the result is presented to us in the finding of the court. That finding is, that the transaction was not a loan at all, but only a sale of the bonds; and it is not pretended that the Ohio Life and Trust Company might not *purchase* securities of this sort at any price it might deem expedient. But the defendant contends that this was a conclusion of law on the part of the court, and that it was erroneous. Surely the question whether a negotiation of bonds was a sale or a loan is ordinarily, and *prima facie*, a question of fact. To make it a question of law, some fact must be admitted or proved, which is irreconcilable with one conclusion or the other. What fact in this case is irreconcilable with the conclusion that this negotiation was a sale? The defendant contends that the fact that the bonds were its own obligations is such a fact, and alleges that in law a party cannot sell its own obligations to pay money. But it certainly may do this, if authorized by law to do it; and it is shown that this very thing was authorized by the laws of Ohio, to the benefit of which the defendant was expressly, as well as by comity, entitled.

Again, the defendant alleges that the exaction of collateral security for the payment of the bonds was a fact wholly irreconcilable with the sale. We do not think so. Once concede that the obligor may sell its own bonds, what difference can it make how fully and strongly they may be secured? The requirement of guaranties can only amount to evidence of intention at most; the weight of which, in connection with all the circumstances of the case, is to be judged of by the tribunal to which the facts are submitted. This has been fairly done in the present case, and the decision is against the defendant.

In this view of the case we do not decide whether the demurrer to the first plea was, or was not, well taken. We are disposed to think that it was; but do not deem it necessary to incur the case with the discussion of that question.

Judgment affirmed.

WHAT LAW GOVERNS CONTRACT OF DRAWER OR INDORSER.

Everett et al. v. Vendryes (1859), 19 N. Y. 436.

Appeal from the Supreme Court. Action by the indorsee against the drawer of a bill of exchange drawn by the defendant at Carthagena, in New Granada, upon the New Granada Canal and Steam Navigation Company, a corporation created by and having its principal office in this state. It was payable to the order of Manuel Narcisso Jimenes, indorsed by him at Carthagena, and was protested for non-acceptance. The answer denied the indorsement by Jimenes, in general terms. On the opening of the trial before Mr. JUSTICE DAVIES, at the New York Circuit, the defendant asked leave to amend his answer by inserting the laws of New Granada in respect to the indorsement of bills of exchange. The motion was denied, and the defendant took an exception. After the plaintiffs had concluded their proof, the defendant offered to prove the laws of New Granada, and that by such laws the indorsement of Jimenes, which was in the form usual in this State, was void. The plaintiffs objected, on the ground that the said laws were not set forth in the answer; the objection was sustained, and the defendant excepted. The defendant then renewed his motion to amend the answer, tendering the proposed amendment which averred that by the law of New Granada the indorsement of any bill of exchange must contain, first, the name and surname of the person to whom the bill is transferred; second, if the value or consideration be received in cash, in merchandise, or if it be in account; third, the name and surname of the person from whom it is received, or on whose account it is charged, if he should not be the same to whom the bill is transferred; fourth, the date on which the indorsement is made. Also, that "an indorsement not expressing the value or date does not transfer the property in the bill, and it is to be considered as a simple commission for collection." The court denied the motion, and the defendant took an exception. The plaintiff had a verdict

and judgment, which having been affirmed at general term in the first district, the defendant appealed to this court.

Nicholas Hill, for the appellant.

J. T. Williams, for the respondent.

DENIO, J.—The principal contract, the bill of exchange sued on, though made in New Granada, was addressed to a corporation legally resident in New York, and was consequently payable there; and, upon general principles, the laws of this State are to be resorted to in ascertaining its nature and interpretation, and the duties and liabilities which it created. This is too well established to require a reference to books. The indorsement was also made in New Granada, but that is considered to be a separate contract, and the obligations of the parties to it are to be determined according to the law of the country in which it was made; so that if this was a question between indorser and indorsee, we should have to resort to the laws of New Granada to ascertain what obligation Jimenes assumed by indorsing the bill to the plaintiffs. (*Aymar v. Sheldon*, 12 Wend., 439). But the action is not against Jimenes, the indorser, but against the drawer; and it is the effect of the original contract and not of the auxiliary one, which is in question. By drawing the bill, the defendant undertook that the drawees in New York would pay it to Jimenes, the payee, or to his order, that is, to any person to whom it should be indorsed; and that if the drawees did not so pay it he would himself make such payment. The plaintiffs claim to be indorsees, according to the legal effect of the bill; and the question is, which law is to govern in determining whether they have acquired that character, that of New Granada or New York? If the former, the plaintiffs must fail, because they have not been constituted indorsees with the formalities which the laws of New Granada have prescribed for transferring a bill by indorsement. But the indorsement is in due form according to the laws of New York. I have not been able to find any authority for such a case; but I am of opinion that upon the reason of the thing, the laws of this state should be held to control. These laws are to be resorted to in determining the legal meaning and effect and the obligations of the contract. All the cases agree in this. In this case the point to be determined was, whether the plaintiffs were indorsees and entitled to receive the amount of the bill of the drawees. This was to be determined, in the first instance, when the bill was presented for acceptance and payment in New York. The plaintiffs' title was written on the bill. The question was, whether it made them indorsees according to the effect of the

words of negotiability contained in the bill itself. Those words and the actual indorsement were to be compared, and the legal rules to be employed in making that comparison, were found in the law merchant of the state of New York; and by those rules the indorsement was precisely such a one as the bill contemplated.

Besides, it is reasonable to suppose that, in addressing this bill to the drawees in New York, the defendant contemplated that they would understand the words of negotiability according to the law of their own country; they would naturally be acquainted with that, while they would, in all probability, be ignorant with the commercial code of New Granada. When, therefore, he directed the drawees to pay to the order of the payee, he must be intended to contemplate that whatever would be understood in New York to be the payee's order, was the thing which he intended by that expression in the bill.

The case of *Trimbley v. Vignier* (1 Bing. N. C. 151) is not in hostility to this conclusion. That was the case of a note made in Paris, the maker and payee being domiciled there; and no place of payment being made, it was payable at the residence of the maker. One claiming to be an indorsee sued the maker in England; but the indorsement to him was in the common blank form used in Great Britain and in this country, while the French Commercial Code, like that of New Granada, required the indorsement of a bill or note to be dated, and to express the consideration, and declared that if it failed to conform to these requirements it should not transfer the paper, but should only amount to a power of attorney. The court held that the law of France governed the contract, and that the plaintiff had not made title to the note. Had it been made payable in England, I presume it would have been held that the law of that country furnished the rule for determining whether the indorsement was sufficient.

For the reasons this briefly stated, I am of opinion that this case was rightly decided in the Supreme Court, and that the judgment should be affirmed.

Judgment affirmed.

Aymar v. Sheldon et al. (1834), 12 Wend. 439.

Error from the superior court of the city of New York, Sheldon and others, as endorsees, brought a suit against B. & I. Q. Aymar, as *endorsers* of a bill of exchange, bearing date 4th June, 1830, drawn by V. Cassaigne & Co. *St. Pierre, at Martinique*, on L'Hotelier Freres, at *Bordeaux in France*, for 4000

francs, payable at 24 days sight, to the order of *B. Aymar & Co.*, the name of the firm of *B. & I. Q. Aymar*. The plaintiffs set forth the *endorsement* of the bill of exchange *at the city of New York*, where, they averred, that they and the defendants, all being citizens of the United States at the time of the endorsement, respectively, dwelt and had their homes; and then aver that on the 11th August, 1830, the bill of exchange was presented to *L'Hotelier Freres*, at Bordeaux, for acceptance, according to the custom of merchants, and that they *refused to accept*; whereupon the bill was duly protested for non-acceptance, and notice given to the defendants. The defendant pleaded, 1. *Non assumpsit*; 2. That the bill declared on was made and drawn in the island of Martinique, a country then, since and now, under the dominion and government of the king of France, by persons there dwelling subjects of the king of France; and that the bill, according to its tenor was payable at Paris in the kingdom of France, by persons then and still residing and dwelling at Bordeaux, in the kingdom of France, subjects of the king of France, to wit, on, &c. at &c.; that the island of Martinique, as well as Paris and Bordeaux, and the persons therein respectively residing, and the *drawers* and *drawees* were subject and governed by the laws of the kingdom of France, there and then, and still existing and in force, to wit, on, &c. at &c.; *that by the laws of France*, then and still at the several places in the plea mentioned, existing and in force, *it is established, enacted and provided*, in relation to bills of exchange drawn and payable in the countries subject to the laws of France, among other things, in manner and form following, namely: The drawer and endorsers of a bill of exchange are severally liable for its acceptance and payment at the time it falls due. (*Code de Commerce*, 119). The refusal of acceptance is evidenced by an act denominated protest for non-acceptance, *id.* 120. On notice of the protest for *non-acceptance*, the endorsers and drawer are respectively bound to give security, to secure the payment of the bill at the time it falls due, or to effect reimbursement of it, with the expense of protest and re-exchange. The time when a bill of exchange becomes due, if payable at one or more days after sight, is fixed by the date of the acceptance, or *by the day of the protest for non-acceptance*. The holder is *not excused the protest for non-payment* by the protest for non-acceptance. After the expiration of the above periods, (certain periods specified in the code, and which, in the case of a bill drawn in the *West Indies on France*, is one year,) for the presentment of bills at sight, or one or more

days after sight, for protest of non-payment, *the holder of the bill loses all his claim against the endorsers, &c.* setting forth, besides the above, a variety of other provisions of the French code, relative to bills of exchange, and then averring, that although at the time of the commencement of the action of the plaintiffs, *twenty-four days after sight* of the bill of exchange declared on *had elapsed*, from the day when the same was alleged to have been protested for non-acceptance, *yet no protest of the said bill for non-payment had been made*, concluding with a verification and prayer of judgment. 3. The defendants pleaded, after referring to the matter of inducement stated in the second plea, that on notice of protest for non-acceptance, as alleged in the declaration, they were ready and willing to give security; and *offered to the plaintiffs to give security*, according to the true intent and meaning of the laws of France, to secure payment of the bill at the time when the same should fall due, to wit, on, &c. at, &c., concluding as in last plea. To the *second* plea the plaintiffs *demurred*, and took issue upon the *third*, denying that the defendants did offer security, &c.

The superior court, on the argument of the demurrer, adjudged the second plea to be *bad*; after which the issues of fact were tried. The jury found for the plaintiffs, on the plea of *non-assumpsit*, and assessed their damages at \$895.52, and found a verdict for the defendants on the third plea. Notwithstanding which last finding, the court gave judgment for the plaintiffs on the whole record. The defendants sued out a writ of error.

D. Lord, jun., for plaintiffs in error.

D. D. Field & R. Sedgwick, for defendants in error.

By the court:

Nelson, J.—The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the endorsers upon default of the drawees to accept, must be determined by the French law, or the law of this state? If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to

present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the endorsers and endorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle, however, seems more fully settled, or better understood in commercial law, than that the contract of the endorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by *endorsement* is equivalent in effect to the *drawing* of a bill, the endorser being in almost every respect considered as a new drawer. (Chitty on Bills, 142; 3 East, 482; 2 Burr. 674, 5; 1 Str. 441; Selw. N. P. 256). On this ground, the rate of damages in an action against the endorser is governed by the law of the place where the endorsement is made, being regulated by the *lex loci contractus*. (6 Cranch, 21; 2 Kent's Comm. 460; 4 Johns. R. 119). That the nature and extent of the liabilities of the drawer or endorser are to be determined according to the law of the place where the bill is drawn or endorsement made, has been adjudged both here and in England. In *Hix v. Brown*, 12 Johns. R. 142, the bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given: the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and in that state, of course from the bill in question. He pleaded his discharge here, and the court say, "it seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another state, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans. The case of *Peters v. Brown*, 5 East, 124, contains a similar principle. See also 3 Mass. R. 81; *Van Raugh v. Van Arsdaln*, 3 Caines, 154; 1 Cowen, 107; 6 Cranch, 221; 4 Cowen, 512, n.

The contract of endorsement was made in this case, and the execution of it contemplated by the parties in this state; and it is

therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the *drawer* are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the *endorser*; for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable 24 days *after sight*, and must be presented for acceptance; and it is well settled by our law, that the holder may have immediate recourse against the endorser for the default of the drawee in this respect. (3 Johns. R. 202; Chitty on Bills, 231, and cases there cited).

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law which is not only convenient, but grows out of the necessity of the case. The notice however, must be given according to the law of the place where the contract of the drawer or endorser, as the cause may be, was made, such being an implied condition. (Chitty on Bills, 266, 93, 217; Bayley, 28; Story's Conflicts of Laws, 298).

The contract of the drawers in this case, according to the French law, was, that if the holder would present the bill for *acceptance* within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same if default was also made in the *payment* by the drawee after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insists that it is also the implied contract of the endorser in this state. But this cannot be, unless the endorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the endorsement is made. We have seen that

this is not so; that notice must be given according to the law of the place of endorsement; and if, according to it, notice of non-payment is not required, none of course is necessary to charge the endorser. But if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle, that the endorsement is equivalent to a new bill, drawn upon the same drawee; for then the rights and liabilities of the endorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the endorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We cannot break in upon the settled principles of our commercial law, to accommodate them to those of France or any other country. It would involve them in great confusion. The endorser, however, can always protect himself by special endorsement, requiring the holder to take the steps necessary according to the French law, to charge the drawer. It is the business of the holder, without such an endorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

Judgment affirmed.

WHAT LAW GOVERNS PROCEDURE AND REMEDY.

Collins v. Manville (1897), 170 Ill. 614.

Writ of error to the Appellate Court for the First District; —heard in that court on writ of error to the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

Oliver & Mecartney, for plaintiff in error.

Peckham & Brown, for defendant in error.

Mr. Justice CARTWRIGHT delivered the opinion of the court:

In the Circuit Court of Cook county the defendant in error recovered a judgment for \$8280.80 upon a promissory note payable to his order, dated September 1, 1886, for \$5250, payable

twelve months after date, with interest at the rate of six per cent per annum, and the judgment has been affirmed by the Appellate Court.

The note was made and executed in the State of New York, and the cause of action arose there. Defendant has been a citizen and resident of that state since the year 1883, and plaintiff lived in New Jersey when the note was made and until December, 1886, since which time he has been a citizen of Colorado. The time within which suit could be brought in this State was therefore governed by section 20 of our statute in regard to limitations, and if by the laws of the State of New York an action on the note could not be maintained by reason of the lapse of time, the action could not be maintained in this state. That defense was pleaded and interposed at the trial, and the New York statutes were admitted in evidence by written stipulation. The New York code requires that an action of this kind must be commenced within six years after the cause of action has accrued, and this suit was commenced August 31, 1893, by plaintiff filing a *præcipe* and declaration, and causing a summons to be issued and given to the sheriff, directing him to summon the defendant to appear at the next term of the Circuit Court. An action on the note was not barred at that time in the state of New York, and under our statute such action could be maintained here. The issuing of the summons and delivery to the sheriff for service were the commencement of action in this state. (*Feazle v. Simpson*, 1 Scam. 30; *Chicago and Northwestern Railway Co. v. Jenkins*, 103 Ill. 588; *Schroeder v. Merchants and Mechanics' Ins. Co.*, 104 id. 71; *Fairbanks v. Farwell*, 141 id. 354).

The court instructed the jury, in substance, that if the plaintiff, within six years from the maturity of the note, caused summons to be issued and given to the sheriff of Cook county for service, then the action was not barred. It is claimed that this instruction was erroneous because of what occurred after the commencement of the suit, and by reason of further provisions of the New York code as to what should be deemed the commencement of an action in that state. The provisions in question are, in substance, that an action is commenced, within the meaning of the Limitation act of New York, when the summons is served on the defendant, or on a co-defendant who is a joint contractor or otherwise united in interest with him, and that an attempt to commence an action is equivalent to the commencement thereof when the summons is delivered to the sheriff of the county in which the defendant resides or last resided; but in order to entitle the plain-

tiff to the benefit of this last provision the delivery must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service upon the defendant or by the first publication of the summons against him pursuant to an order for service upon him in that manner. In this case there was no service on the defendant within sixty days after the expiration of the six years. The summons was returned by the sheriff "not found," and successive writs issued for each succeeding term, were returned in like manner until personal service was obtained, five months after the suit was commenced.

It is argued that although the suit was commenced in time in this state and when it might have been brought in New York, yet because the New York code provides for an abatement of the action on account of a subsequent event which prevents the plaintiff from maintaining or continuing it, the same rule of procedure must be adopted here. To this proposition we cannot assent. The form and mode of procedure must be according to the rules of the state. If it were a question of when an action had been commenced in the State of New York, the laws of that State would govern; but the question here is, when was the action commenced in this State?—and as to that our laws must control. The question is purely one of remedy and procedure, governed by the law of the forum. The laws of each State require that the action shall be commenced within a certain time, and it was commenced within that time. It would not only be contrary to all established rules to adopt the procedure of the New York code and abate the action lawfully commenced, but also most unjust, for the reason that the New York code provides a method by which the plaintiff could maintain his action by publication of summons within the time. Our law does not permit such service in an action of assumpsit, and to apply the New York rule would be to deprive him of the benefit of that rule as to service by publication, and cut off his rights by means of the other branch of the rule.

The only other complaint is, that the court refused to grant a new trial on account of newly discovered evidence. The evidence was of a cumulative character and not conclusive of the rights of the parties, and the court did not err in denying the motion for a new trial.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Obear v. The First Nat. Bank (1895), 97 Ga. 587.

Complaint on note. Before Judge WESTMORELAND. City court of Atlanta. May term, 1895.

Hines & Hale, for plaintiff in error.

James H. Gilbert, contra.

SIMMONS, Chief Justice.—This was an action upon a promissory note, not under seal, which was executed and by its terms made payable in the state of Alabama. The note was dated February 9, 1888, and was payable on demand. The suit was filed April 17, 1894. Upon the note were unsigned entries reciting the payment of certain amounts thereon on August 7 and August 23, 1888. By an amendment to the declaration the plaintiff alleged that these amounts were paid on the dates mentioned, and that by the law of Alabama partial payments upon a note not barred by the statute of limitations operate as a recognition of the debt and establish a new date for the commencement of the period of limitation. It did not appear by whom the entries on the note were made. The defendant demurred generally to the declaration as amended, and demurred to the amendment on the ground that the facts therein stated do not take the note out of the statute of limitations, and that the case is governed by the statute of limitations of Georgia, and not that of Alabama. The defendant also moved to dismiss the suit because it appeared to be barred by the statute of limitations of this State. The demurrer and the motion to dismiss were both overruled, and to these rulings the defendant excepted.

In this State all actions upon promissory notes not under seal must be brought within six years after the same become due and payable. (Code, § 2917). The note sued upon was payable on demand, and therefore was due immediately. (Code, § 2791). In order for a partial payment upon a note to constitute a new point from which the period of limitations will begin to run, the payment must be entered upon the note, and the entry must be made in the debtor's own handwriting, or subscribed by him, or some one authorized by him. (Code, §§ 2934, 2935). And the holder of the note cannot be the agent of the debtor to make such an entry. (*Shumate v. Williamson*, 34 Ga. 245; *Wright v. Bessman*, 55 Ga. 187). If, therefore, the case is controlled entirely by the law of this state, the action was barred, it appearing that more than six years had elapsed from the time the right of action

accrued until the suit was filed, and it not appearing that either of the alleged payments on the note was entered thereon by the debtor or by any person authorized by him.

It is well settled that the limitation of actions is controlled by the *lex fori*, and not by the law of the place where the contract was made or is to be performed. This was conceded; but it was contended that the rule is different as to the statute of frauds and laws of that nature; and that while the period of limitation in this case is that fixed by the law of Georgia, the law of Alabama governs with regard to the effect of partial payments in constituting a new point for the commencement of that period; and such payments being of themselves sufficient for this purpose under the law of Alabama, it was not necessary that they should be entered on the note in the manner prescribed by the law of Georgia. In support of this contention, counsel relied upon section 8 of the code of this state, which declares that "the validity, form and effect of all writings or contracts are determined by the laws of the place where executed."

We do not agree with counsel in this contention. This provision of the code is declaratory of a rule which prevails universally among civilized nations, and which is applied in determining as to the nature, validity and interpretation of contracts; and it is not to be so construed as to conflict with the rule, equally well established, that matters respecting remedies on contracts, such as the mode of procedure and proof, and the time within which suit shall be brought, are regulated by the law of the forum, or place where the suit is brought. A law prescribing the manner in which a new promise, or a payment from which such a promise will be implied, shall be evidenced in order to extend the period within which suit may be brought upon a contract, relates to the remedy, and does not affect the intrinsic validity of the promise. The question of what evidence shall be required for this purpose in an action upon the contract is one thing; the question whether a promise not so evidenced is valid or not is another and different thing. The statute referred to is in the nature of a statute of frauds, its object being the prevention of fraud and perjury and the avoidance of the uncertainties to which parol evidence is exposed, (*Watkins v. Harris*, 83 Ga. 683), and it should be applied as well in cases like the present as in cases where such a promise is alleged to have been made in this State, if it be possible to do so without holding the promise itself void. This we think can be done; and in this view we are supported by various decisions upon the statute of frauds, both in England and in this

country, and by the authority of leading text-writers. Upon the ground that compliance with the requirements of the statute does not constitute the contract, but that the statute presupposes an existing lawful contract, and affects only the remedy for the violation of the contract, it is held that where a contract within the statute is, by the laws of the country where it is made and to be executed, valid and enforceable, still no action can be maintained upon it in the courts of the country where the statute prevails, unless its requirements be satisfied. See Browne, Statute of Frauds (5 ed.), §§ 115a, 136, and cases cited; especially the leading English case on this subject, *Leroux v. Brown*, 12 C. B. 801, 74 Eng. Com. Law Rep. 800, where the question was argued at some length, and upon the ground above stated it was unanimously held by the judges that an action would not lie in the courts of England to enforce an oral agreement made in France, and valid there, which if made in England could not, by reason of the statute of frauds, have been sued upon. See also the well considered opinion of Park, J., in the case of *Downer v. Cheseborough*, 36 Conn. 39, 4 Am. Rep. 29, where it was held that the evidence by which the contract was to be proved was no part of the contract itself, and was governed therefore by the *lex fori*, and not by the *lex loci contractus*. "Any other view of the law," it was said, "would lead to endless perplexity. Evidence merely informs the court what contract was made. It has nothing to do with the obligations imposed by the agreement. Parties are presumed to contract in accordance with the law of the place where a contract is made. The law forms a part of it. But can it be said that the parties contract in regard to the mode by which its terms and conditions shall be made known to the court if a suit should be brought on the contract?" There is some conflict of opinion on this subject, but we think the views above stated are sustained by sound reason as well as by the weight of authority. Dr. Wharton, in his work on the Conflict of Laws (§ 690), says: "Such statutes are based on moral grounds. Their object, as is shown by the title of that which served as the pattern of all others, is to prevent fraud and perjury. Here then would come into play the position on which Savigny lays such great stress, that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states. It is true that Judge Story opposes to such a conclusion his great authority. He maintains that where patrol contracts are good by the law of the place where they are made, they may be

enforced in countries where they would, if there executed, be barred by the statute of frauds; and he cites a number of cases to this point, none of which his editor, Judge Redfield, states, seems to adopt the views he here intimates." Judge Redfield, in the note referred to, says: "We must confess that upon principle, as the statute does not declare the contracts void, but only that no action or suit, either in law or equity, shall be maintained on such contract, it ought to be regarded as a statute affecting the remedy rather than the contract, and that wherever made, it could not be sued in the courts of a state where the statute expressly provided that no such action shall be maintained." In the case of *Denny v. Williams*, 5 Allen, 1, where a different rule was stated, and in the cases of *VanReimsdyk v. Kane*, 1 Gall. 630, *Smith v. Burnham*, 3 Sumn. 435, and *Low v. Andrews*, 1 Story, 38, in which doubt on this point was expressed by Judge Story, the question was not actually presented for decision. A case which goes very far in vindicating the control of the *lex fori* in such cases is that of *Bain v. Whitehaven*, 3 House of Lords Cases, 1, where the matter is discussed by Lord Brougham, and the conclusion stated, that whether a certain matter requires to be proved in writing or not, and whether certain evidence proves a certain fact or not, is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it. See also *Wilson v. Miller*, 42 Ill. App. 332; *Kleeman v. Collins*, 9 Bush (Ky.), 460; Wood, Statute of Frauds, § 166.

It follows from what has been said, that the court below ought to have sustained the demurrer and dismissed the action.

Judgment reversed.

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